SUPREME COURT U.S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1880.

UNITED STATES
v.
ERIE RAILWAY COMPANY. } No. 239.

PLAINTIFFS' BRIEF.

In the Supreme Court of the United States.

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UNITED STATES
v.
ERIE RAILWAY COMPANY. } No. 239.

PLAINTIFFS' BRIEF.

STATEMENT.

Suit to recover taxes alleged to be due on certain interest coupons attached to defendants' bonds, which coupons were paid in the years from 1866 to 1869, inclusive; and a penalty for the non-payment of such taxes.

Prior to September 1, 1866, defendants issued and sold these sterling coupon bonds to the amount of £800,000 sterling, dated September 1, 1865, the principal of which was payable ten years after date, principal and interest made payable in London, England. Between March 1 and September 1, 1868, defendants issued and sold £200,000 sterling of bonds of the same class and character, the interest on the whole being payable semi-annually, March 1 and September 1 of each year. All these bonds were sold directly to London bankers, who resold them to European customers. From 1866 to 1869 all but £20,000 of these bonds were owned and held by non-resident aliens. Funds to pay the interest-coupons as they fell due were provided by the defendants sending the gross

sum necessary to pay them to J. S. Morgan & Co., bankers, in London, by whom the same were paid upon presentation at their banking-house, where they were made payable.

The amount of coupons paid from 1866 to 1869, inclusive, was £186,000. A five per cent. tax would be £9,300. This £186,000 includes the £20,000 held by citizens of the United States. The currency value of the £9,300 interest on day of payment was $62,592.34; on the day of trial (December 23, 1876) it was $48,267. The currency value of the interest on the £20,000 was $1,415.95 when paid, and $1,089.80 at time of the trial.

The defendants made no returns of the payment of this interest to any internal-revenue officer, nor did they ever pay any tax on the interest nor withhold it from the interest, but paid the face value of the coupons. No assessment was ever made upon the defendants on account of this interest, nor was any demand of payment of a tax therefor made till December 31, 1872. No penalty has ever been paid for failure to make returns of these interest-coupons. (Record, 11 to 13.)

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign for error the decree of the United States circuit court for the southern district of New York affirming the judgment of the United States district court for said district in favor of the defendants, upon the facts stated, as to all but the tax upon the coupons attached to the bonds for the £20,000 held by citizens of the United States (record, 20, 21; 17, 18); as to which tax and a penalty of $1,000 final judgment was entered in favor of the United States, and no appeal taken.

BRIEF.

The act of July 13, 1866, chap. 184, which is relied upon as justifying nearly, if not quite, all of this tax, provided—

"That any railroad * * * company indebted for any money for which bonds and other evidences of indebtedness have been issued payable in one or more years after date upon which interest is stipulated to be paid or coupons representing the interest, * * * shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, * * * whenever [and wherever] the same may be payable [and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens]; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons and dividends due and payable as aforesaid the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies have contracted otherwise. Provided, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness." (14 Stat., 138, 139.)

The words inclosed in brackets in the foregoing quotation do not appear in the act of June 30, 1864, chap. 173, sec. 122, but are inserted in this amendatory act of

July 13, 1866, chap. 184, which substitutes the section as above printed for the original section 122 of the former act. The only other change is to substitute "tax" for "duty." Compare 13 Stats., 284–'5 with 14 Stats., 138–'9. It will be found that the second was only declaratory of the purpose of the first, which was defeated by the construction put upon it in Railroad Company *v.* Jackson (7 Wall., 262).

I.

Unless the court at this term is prepared to reverse an unanimous opinion, expressed upon the precise point in this case, at its last term (October, 1879), it must reverse the judgment of the court below in this case, and remand it with directions to enter judgment in favor of the United States. Mich. C. R. R. Co. v. Slack, Colr, 100 U.S., 595.

The basis of the assessment is the currency value of the coupons at the time they were paid, *i. e.*, $62,592.34.

Western Union R. R. Co. *v.* United States, 101 U. S., 543.

The intention of the legislature is apparent. The amendatory act of July 13, 1866, chap. 184, in it samendment of section 122 of the act of June 30, 1864, chap. 173, could have no other purpose in the clause above quoted than to put a tax upon the company, measured by the coupons it paid, wherever and to whomsoever payable.

Certainly it is no violation of the Constitution of the United States to measure and define a tax proportionately to the amount of interest paid by a corporation upon borrowed money, even if the loan be effected wholly or in part abroad, and it continue to be so held

that nearly all or the whole of the interest is payable abroad. (100 U. S., 595.)

Whether or not there was any express stipulation that the interest coupons should be paid "free of government tax" does not appear, unless inferentially from the statement that the payment in full was "according to the true intent and obligation of said bonds." (Record, 13, top.)

If there was such an engagement the tax fell ultimately and altogether upon the corporation, beyond all question.

But if the United States choose to tax the property of aliens found here, there is nothing in the Constitution to prevent it, and this instrument is the only limitation to the Congressional exercise of the taxing power. "In its very nature it acknowledges no limits, and the only security against abuse must be found in the responsibility of the legislature which imposes the tax to the constituency who are to pay it." (Cooley on Taxation, 4, section 4).

When taxed, the thing in question was within the jurisdiction of the United States. The rights of the non-resident aliens thereto were protected by the United States. If necessary, the whole force of the country, of every sort, would have been called out to enforce such rights, and in the mean time the latter were guaranteed by a general persuasion of the truth of this. The principle is the same as regards land, cattle, specie, stocks in corporations, or other choses in action. The tie reciprocal to that of *protection* binds all; and that is, in part, the duty of contributing to the support of the protecting machinery. (Catlin *v.* Hull, 21 Vermont, 152.) The duty,

so far as it falls *in rem*, seems the more absolute because in this particular instance it cannot be shared *in personam*. The resident alien contributes by his person to the strength of the protecting society, and so far is in a condition more favorable than that of the non-resident for protesting against burdens upon property.

The principle that choses in action follow the *situs* of the owner, once the rule as to all personal property, is a convenient one for many purposes, but, except in a country like England, which is so much a gainer thereby, has no proper application to matters of revenue. (Alvany *v.* Powell, 2 Jones, N. C., Eq., 51.) If Congress decides that from its situation as regards borrowing and lending this community may well adopt the opposite theory, it is difficult to say why such decision is not matter of plain legislative discretion, or who there is in our system of government that therein can say it nay.

The questions in the cases of Murray *v.* Charleston, 96 U. S., 432, and foreign-held bonds, 15 Wall., 300, were in regard to action by State authorities, and therefore stand upon different grounds.

The chose in action [coupons] were merely evidence of the right to money to be earned here, from the business done here, by the issuing corporations, which could only pay by means of such earnings. Congress could have assessed its gross earnings. This act in effect says that so much of them as are required to pay this interes shall be subject to a tax of five per centum. Whether the company can withhold the tax so paid from its creditors depends upon the nature of the contract it has made with them. At any rate, the provision for a deduction does not invalidate the tax. (100 U. S., 595.)

Here the tax is upon the earnings which was to pay

the interest, or the fund accumulated by the use of the property which was intended to be exercised for the purpose of making such accumulation. In case of default of payment the coupons would be utterly useless, except as evidence in an action brought here to compel payment.

Certainly, then, Congress had jurisdiction over the subject-matter of this tax.

II.

No assessment of this tax was necessary. King v. U.S., 99 U.S., 233.
Dollar Savings Bank *v.* United States, 19 Wall., 240.
United States *v.* Ferrary, 93 U. S., 631, top.
United States *v.* Hazard, 22 Int. Rev. Rec., 309.
United States *v.* Halloran, *Id.*, 321.
U.S. v. Little Miami R.R. Co., 26 " 101.

III.

Nor does any lapse of time bar a *suit* by the United States, though that within which the assessor or commissioner may lay an assessment collectible by distraint is limited by the very act authorizing such official to assess at all. *Nullum tempus*, &c.

United States *v.* Thompson, 98 U. S., 486, 488–490.

EDWIN B. SMITH,
Assistant Attorney-General.

SUPREME COURT U.S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
THE ERIE RAILROAD COMPANY. } No. ~~84~~ 11

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
THE ERIE RAILROAD COMPANY. } No. 34.

BRIEF FOR THE UNITED STATES.

An agreed statement of the facts upon which this action, brought below by the United States, is founded, appears upon pp. 11–13 of the record.

It is, in brief, an action to recover from the company certain taxes (and penalties) for coupon-interest paid by it from September, 1866, to September, 1869, inclusive, to *non-resident alien holders of its bonds*,—taxes claimed under the act of June 30, 1864, section 122, as amended by the act of July 13, 1866, Sec. 9 (14 Stat. 138, '9). This act is given in the brief heretofore filed upon behalf of The United States by *Mr. Smith*, and more fully in the brief of the learned counsel for the company.

The important provision in that statute is the following:

That any railroad * * * company indebted for any money for which bonds or other evidence of indebtedness have been issued

payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, * * * shall be subject to and pay a tax of five per centum on the amount of all such interest as coupons, * * * whenever [and wherever] the same shall be payable [and to whatsoever party the same may be payable, including non-residents, whether citizens or aliens].

The change in the above provision between the language of the act of 1864 and that of 1866 is indicated by the *brackets*. The words *inclosed* were added in the latter year.

It is agreed that between the dates first above mentioned the company paid to certain of its non-resident alien creditors the sum of £181,800, and the principal question is whether it is bound under the above statute for the taxes in question; or more particularly, inasmuch as *the intention* of the legislature, as above expressed, is plainly to the effect that such taxes shall be levied, the question is whether the statute is constitutional. His Honor below held that the statute in this respect is unconstitutional.

That ruling is hereby assigned for error.

Also the judgment "That the defendants have judgment for all other claims for penalties aforesaid." (p. 18, top.)

1. The tax imposed as above by the act of 1866 is obligatory.

Under our system of government, the intention of the legislature expressed in a constitutional statute is binding upon all persons and things within the sovereign jurisdiction of the nation.

As the expressed intention in this case is admitted to be clear, the only question is one of *constitutionality.*

Under a written constitution, questions of this sort are altogether questions of the application of one writing to another.

This is so even in the matters referred to by the court in its Opinion in Loan Association *vs.* Topeka (20 Wallace, p. 663), quoted by the learned counsel for the company in his brief, at p. 37; as it is evident that a constitution which takes notice of and distributes *legislative, executive,* and *judicial* functions, *by those terms,* forbids any "statutes" that are not *legislation, i. e.,* any which enact, for instance, *that A and B who are husband and wife shall be so no longer, but A shall be husband of C, and B wife of D;* or, *that the homestead now owned by A shall be his no longer, but shall hereafter be the property of B.*

There may not be much danger, in point of fact, of our having *too much* constitution; but *a writing* is intended to protect against *that,* as well as against *too little.*

The question therefore recurs: By what language (including general framework) of the constitution is the taxation in question forbidden?

Another question to the same purpose is, By what provisions of the Constitution has the judiciary control over legislative action of the kind before the court?

To take up the second of these questions first in order, it is submitted:

(*a.*) That the question, What persons and things are

within the sovereign jurisdiction of the United States, is originally a *political* question; and therefore, in the first place, to be settled by the political department; and that it can be taken cognizance of in the courts only in conformity with, and subordinately to, such decision.

When any matter that involves a question of that kind comes before the courts, if there be nothing thereupon contained in the Constitution, they inquire what has been done by the legislature or the executive, and if no action be found there, then and then only they inquire how the matter stands upon that *comity* which sometimes allows of the operation of foreign law upon domestic questions. *The Constitution*, *Legislation*, and *Comity* represent three grades of law, of which the last gives way before the second, as the second before the first; no political action of the second sort that is conformable to the first being questionable by the courts because in conflict with principles under the third; the judiciary recognizing *comity* as a source of municipal law only because, and so far as, the political department has *acquiesced* in its application, i. e., *quatenus sine prejudicio indulgentium fieri potest.* (Story, *Conflict*, &c., p. 414.)

These are universally recognized principles in jurisprudence. It follows that *comity* can never be appealed to for the purpose of enlarging the scope of existing constitutional restrictions upon legislation.

I hope to show in the sequel that in point of comity alone the taxation in question is competent, but in the mean time I submit that the situation is such that no discussion of the requirements of comity is necessary.

The practical question before the court, at this point is, whether a determination of the boundaries which di-

vide their sovereign jurisdiction *over things personal* from like sovereign jurisdiction of other nations, is as much a political matter as is the like determination of boundaries of *territory*.

In the latter case it has been often held, and is frankly admitted in the brief for the Company, that the question is political; but it is suggested for the Company that a substantial difference in that regard exists *as to things personal*.

It seems that no such difference can be made out.

This denial is perhaps implied in the maxim, *Quidquid est in territorio est etiam de territorio*, (Heffter, Paris, ed., 1873, p. 134,)—but waiving that,

The reason why a determination as to the boundary of the *territory* of any sovereign nation is what under our system of public law is known as a *political* matter, is, that all denials of the extent of sovereign jurisdiction claimed by a particular State must, in effect, be counter assertions in the interest of the sovereign jurisdiction of some other State: or, in other words, questions between State and State. That in point of form it may in one case have been actually raised *by the foreign State itself*, and in another only *by a citizen of that State*—or, *for a citizen of that State by a citizen of the State against which the claim is made*, can make no difference as to the *nature* of the question. The question, however, raised, is *inter-State*, and one therefore to which all persons and things claimed by the one sovereign as belonging to it, must espouse the same side that that sovereign does (see Rev. Stat., sec. 5335); it being true of such positions in time of

peace, as well as in time of war, that all persons and things so claimed are, *in the judgment of all departments of that government*, consenting parties to the position taken by it, and bound to make good such contention by every exertion, and at every sacrifice, active or passive. Such questions are, therefore, in substance, always parts of *foreign* intercourse, and to be conducted and settled by that branch of the government which has constitutional control of the class to which they belong.

Again, such questions, so far as matters of public business and not of mere speculation, must be decided by that department which has the means of enforcing the decision; which means, for the matter under discussion, are the Army and Navy. For it must be borne in mind that the extent of sovereign jurisdiction is always, at least, a matter to be expressly yielded or acquiesced in by *some other sovereign*. In its nature it cannot be settled in the domestic tribunals of either sovereign. Its final arbiter, therefore, is war, whether it concern "59° 40′," or "Macleod," or any other person or thing.

Here again the conclusion is that the question is *political*.

In Foster *vs.* Neilson (2 Peters, 253), the question involved the meaning of a treaty as to boundary. Inasmuch as a treaty is part of the supreme *law* of the land, it might have been supposed that its meaning was a *legal* question. Yet in that case the political element involved colored the whole matter, so that the court could only *accept* what had been *done to its hand* by its co-ordinate department; taking, *not* the words of the treaty for the supreme law, but the construction put upon those words by the legislature. So in Garcia *vs.* Lee, 12 Peters, 511.

In Williams *vs.* The Insurance Company (13 Peters, 415), the same rule is applied to an official declaration *by the President* as to the boundary of *Buenos Ayres*. The court says, "Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and the government of the Union" (p. 420).

In the case of The Exchange, 7 Cranch, 116, a private action for a vessel then lying in the port of Philadelphia, the court doubting about the sovereign jurisdiction of the United States over the thing in controversy allowed the attorney for the United States to intervene at the instance of the Executive, to inform them authoritatively that the vessel was a public ship belonging to France, and that it had entered the port in question with the consent of the United States.

Thereupon the libel was dismissed, the court intimating that a like certificate in other terms would have been competent to settle their doubts in a contrary direction.

So the operation of treaties exempting, *to a certain extent*, certain foreign things personal from legislation by

the United States, has been decided to be a matter within the power of Congress, and to be enforced in the courts only according to Congressional allowance. To such effect are the tariff cases, Taylor *vs.* Newton (2 Curtis, 454), and Ropes *vs.* Clinch (8 Blatch., 304).

In the Cherokee Tobacco case (11 Wallace, 616), which cites the last-named case with approbation, the *situs* of the tobacco was, by express treaty, "an exempt jurisdiction" as to the matter before the court, yet the action of Congress to the contrary gave the rule of decision, and the tobacco was declared forfeited. Some difference existed in the court as to the *meaning* of the statute. There was none, however, as to the *power* of the legislature. The decision goes upon broad grounds applicable to all external jurisdiction—the court saying that a treaty is like ordinary legislation, *i. e.*, it depends for value as regards a conflicting Federal statute, upon its relation in point of time, as prior or posterior thereto.

In this connection it occurs to submit that the rights of foreigners, sovereign or others, to contradict the sovereign jurisdiction of the United States cannot be placed upon higher ground than when secured by treaty. For instance, the claim in behalf of these bondholders, under any conceivable law of nations, would be more fully ascertained if there had been an express treaty to that effect. But if there had been such a treaty in full force at the time of the passage of the act of 1866, the above cases show that for any judicial purposes in courts of the United States it would have been annulled.

As actual supreme *law*, the treaty would have been superior in point of dignity to any supposable *comity;* but as mere law, in its turn it would have been liable to be superseded by any law of later adoption.

There is another and very extensive class of cases which may be referred to upon this topic. It seems that their bearing upon the question before the Court is of the highest importance, whether they proceed upon the ground that the sovereign jurisdiction there taken for granted by the courts has been so taken in consequence of *a decision to that effect by the political department*, or, *as matter of law cognizable by the court*. In the absence of any express determination that the assumption has turned upon the latter ground, I shall take for granted that it has been an application of the former principle.

In any case, however, as I have said, this class of cases seems of the highest authority for the contention of the government. It is of the more complete application here, because it involves that particular class of things personal known as *choses in action*.

I may be allowed to premise that I do not understand that the maxim *Things personal follow the person of their owner*, has any more complete application to choses in action than to other choses. So far as the rule applies at all it applies *perfectly* to choses in possession.

I do not find that it ever applies in questions affecting *imperium* as distinguished from *dominium*. I refer to the maxim "*Omnia rex imperio possidet, singuli dominio.*" Even in matters of *dominium* its application is not universal.

I quote from Fœlix, *Droit Intern.* ed. 1866, vol. 1, p. 134:

> We have seen that the rule according to which movables are governed by the law of the domicile of the owner reposes upon

the intimate relation between movables and the person of the proprietor—is a legal fiction which regards them as existing at the domicile of the latter. From hence it follows that this rule can be applied only to circumstances or to acts in which movables appear only as an accessary of the person; for example, in case of succession *ab intestato*, dispositions by last will or between living persons (such as marriage contracts, express or tacit.) *The rule is without application in all cases where movables have no intimate relation with the proprietor's person;* for example, where the property in movables is in litigation, when the maxim that possession gives title is invoked, when rights under the law of pledge are to be exercised, or rights of execution against movables or of prohibition against their alienation, or pronouncing their confiscation, or upon succession by the fisc for want of heirs, or, finally, an interdiction of their exportation. In all these cases we must apply the law of the place where the movables are in fact found, for the above fiction gives way before such fact.

So Merlin, *Repertory*, &c., vol. 10, p. 236, 2d col.:

Whenever the question is as to rights to be exercised over movables by third parties, it is not the domicile of the possessor which we consider, but only the place where they are found; and as the judge of the place where they are found is the only one competent to take cognizance of a seizure, it is also by the law of the same place only that the validity of such seizure is to be decided.

So the cases cited upon this rule by Story in his *Conflict*, &c., are cases to which private persons only are parties, and the reasons which he states for its existence are reasons only for private transactions—rules for cases where, as Fœlix says above, the person of the owner makes a principal figure in the transaction, or, as Merlin says, the rights of third persons do not intervene. But in case of taxation, it makes no matter to the State who is the owner, and its intervention is that of a third person. The right of taxation under a

constitutional government is a right anterior to the Constitution, a right in the nature of things, although regulated by the Constitution. In discussing international questions it is to be assumed that the State has *direct* relations to all property within its borders; that is, relations irrespective of the private owners.

Vattel says:

All things susceptible of being property are considered as belonging to the nation which occupies the territory, and constitute the total or mass of its possessions. But the nation does not possess all in the same manner. Those things which are not divided among communities or municipal bodies politic or individuals of the nation are public property, * * * and the things belonging to individuals are termed private property. (Book 1, § 235.)

So Wheaton:

Every independent State is entitled to the exclusive power of legislation in respect to the personal rights and civil state and condition of its citizens, and in respect to all real and personal property situated within its territory, whether belonging to citizens or aliens. (Inter. Law, § 77.)

So Phillimore, 1, 188:

No individual proprietor can alienate his possessions from the State to which they belong, and confer the property of, or the sovereignty over them, on another country.

So Proudhon, 1, 15:

Dominium is perfect in him who enjoys a thing free from a charge on behalf of third persons.

I say *on behalf of third persons;* for the charge of taxation which falls upon our property to satisfy the needs of society, does not prevent our *dominium* from being perfect; or otherwise there could be no such thing as entire and perfect *dominium:* Domain.

I submit that it follows that in exercising the right of taxation a government deals directly with *its own*, by *emperium*, and that except to the extent that its constitution limits and regulates such dealings,—outside of any such limitations and regulations,—it is a matter of no legal consequence to whom the thing taxed belongs, by *dominium*. Upon any *merely international* ground, therefore, there is no basis upon which a non-resident alien can raise a question as to taxation; for as against him this government is but dealing with its own. I will be understood of course as remarking of contentions in which such alien demands rights superior to those of citizens, and depending wholly upon their alien character.

However, it is more satisfactory for ministers of the common law to deal with decisions by courts than with abstract generalities of publicists, and therefore, after this glance at what may be deduced upon the present question from the latter class of authorities, I am glad to turn to the *Reports*.

The sovereign jurisdiction asserted over choses in action due by resident debtors to non-resident aliens by way of attachment in behalf of resident creditors, both at common law, and under statutes, in England, and in America, seems worthy of attentive consideration in this connection.

Under the custom of London and certain other English cities, this jurisdiction, by *garnishment*, has existed from the earliest times down to the present. That custom extended *only* to choses in action. (Drake, *Attacht.*, sec. 1.)

That it was exercised in inferior courts, and thus somewhat trammeled by limitations due to this circumstance, is of no importance when we are considering sovereign jurisdiction, inasmuch as both the allowance and the limitations were by virtue of municipal law. This custom therefore arose at the seat of the greatest foreign commerce which the world has seen, and has continued in full vigor under all subsequent developments of that commerce.

This seems a full answer to any suggestion that an assertion of jurisdiction over a debt due to non-resident aliens by resident citizens, is a violation of the natural rights of the former.

This custom is said to have been suggested by a like rule in the civil law which prevailed on the continent of Europe. (Manro *vs.* Almeida, 10 Wheaton, 423; Levi, Intern. Comm. Law, p. 1094.) Mr. Levi states to some extent the manner in which, as regulated by the French code, the latter operates at the present day upon debts due by French citizens to non-resident aliens.

In this connection it seems proper to add that *outlawry*, which was an ordinary incident to mesne process issuing from the Superior Courts in England, was applicable to non-resident foreigners (Solly *vs.* Forbes, 8 Taunton 516), and operated to cause a forfeiture of debts due to them by English debtors (Tidd., 1, 137.) Inasmuch as upon application by the plaintiff in the action such *outlawry* was assigned to him (ibid., 138), this also was a method at common law by which resident creditors in general might obtain satisfactions out of debts due by residents of England to non-resident aliens.

The *sovereign jurisdiction* over them so exercised is, however, the only matter of importance to us here.

Since the abolishment of this process the Common Law Procedure Act (17 and 18 Vict., C. 125, §§ 61, &c.) has given a remedy involving the same claim of jurisdiction.

How universal and familiar a jurisdiction this is within the United States, under statutes of perhaps all the States, is known to every one. That it was not (until recently) a source of jurisdiction in courts of the United States was expressly said by this court to be due to a statute which, in terms, prevented. (Toland *vs.* Sprague, 12 Peters, 300.)

I may be allowed to cite a few important cases in which jurisdiction has been assumed because of garnishments of debts due by resident debtors to persons non-resident.

Harrison *vs.* Sterry (5 Cranch, 289). Attachment by The United States and other creditors, in the courts of South Carolina, of choses in action, &c., belonging to residents of London, involving the question of *priority*.

The Court said: "In this country and in its courts in a contest respecting property *lying in this country*, the United States are not deprived of that priority which the laws give them, by the circumstance that the contract was made in a foreign country, with a person resident abroad" (p. 299).

× 33 Georgia R. 115, Bridges v. Lamar.

Holmes *vs.* Remsen (4 Johns. Ch. 460, and 20 John, 229).

Here, Clason of New York was debtor to Mullett, of London; Mullett's American creditors attached the debt in Clason's hands; and the question was whether the latter should have credit for a previous payment made by him under an attachment by the custom of London served at London upon an agent of his who had funds there. *Held*, that he was entitled to such credit.

This celebrated case is, therefore, an illustration of the concurrence of English and American law as regards sovereign jurisdiction over choses in action at the place of residence of the debtor; both jurisdictions were upheld; one for the *credit*, the other for the *surplus*.

Ingraham *vs.* Geyer (13 Mass., 146). Attachment in Massachusetts of a debt due by one residing there to a resident of Pennsylvania.

Milne *vs.* Moreton (6 Binney, 35). Attachment in Pennsylvania of a debt due by a resident to one residing in Great Britain.

Upton *vs.* Hubbard (28 Conn., 274). Attachment in Connecticut of a debt due by a resident to one residing in Massachusetts.

The United States *vs.* The Bank of the United States (8 Rob., La., 262). Attachment in Louisiana of debts due by residents to a bank chartered in Pennsylvania.

Moore *vs.* Bonnell (2 Vroom, 90). Attachment in New Jersey of a debt due by one residing there to a resident of New York.

Ward *vs.* Morrison (25 Vermont, 593). Attachment in Vermont of a debt due by one residing there to a resident of New York.

The significance of these cases in the present connection is not far to seek. If a sovereignty may assert jurisdiction over such things in behalf of private creditors, why not also in favor of itself as creditor? If such jurisdiction in behalf of private creditors obtains universally, as it seems, throughout the civilized world, how can there be any apprehension that its extension to the case of so high an obligation as that of revenue is to be an occasion of well-grounded umbrage or exception?

The same jurisdiction has been freely asserted and allowed between nations as regards other important topics, which I will barely mention.

(i). The *power* of confiscating debts due by citizens to alien enemies (Kent, I, 62; Brown *vs.* The United States, 8 Cranch, 110; Lawrence's Wheaton, 530 and 543, &c.)

(ii). The assertion underlying the necessity for ancillary administrations. (Story, *Conflict*, &c., sec. 513, &c.)

(iii). The American doctrine of upholding domestic proceedings *in rem* at the residence of the debtor against foreign proceedings in bankruptcy at the residence of the creditor; which, however, only illustrates the principle that underlies the law of attachment, (*ibid.*, sec. 409, &c.)

I have not been able to find any case in which the sovereign jurisdiction involved in such proceedings has been questioned. Whether this court will regard such silence as evidence that it involved a political question, one therefore unfit to be discussed in courts, or as evidence that as matter of municipal law it was unquestionable, is, as I have said before, of no practical impor-

tance to the government here; but I beg leave to submit that probably it was for the former reason.

Upon the whole, it appears that whether or not a thing, real or *personal*, is within the verge of the taxing power of the United States is, in cases not defined by the Constitution, a question only political.

This is not so of course as to similar questions upon taxation by the States. They are not sovereigns in the sense of that word employed in this discussion, but are subjected by the Constitution for all "controversies" betwixt them to the judicial power of the United States. So also they have no sovereign means of enforcing their will against each other, but must rely for that upon the process of the United States. Therefore, what are or are not proper subjects of taxation by some of them as against claims by others of them, or by the United States, or by foreign nations, may well be questions of mere law.

I submit another proposition upon this part of the case.

The question whether the United States, on the one side, or Great Britain or some other nation on the other, has jurisdiction over any particular *res*, is one that cannot be raised *before any department* of this government except by duly accredited representatives of such foreign government; I mean, cannot be raised so that the decision shall settle the question as between the principal persons *virtually* parties thereto—that is, cannot otherwise be made a matter of public business before

any department. A foreign private person may have a *jus precarium*, *a right in entreaty*, as Blackstone calls it, to represent such a matter so far as he is interested, but he has, *in his special character as claiming rights* SUPERIOR *to those of citizens*, no right to call in question, *contentiously*, action by the legislature or President (within their respective spheres) asserting national jurisdiction over any object of jurisdiction whatever. If he have any private interest in such contention he must make due representation thereof to the proper organ of his own government, and if that see fit to intervene and make it matter of diplomatic correspondence the question will be legitimately considered and determined.

b. If, however, this question be *legal* in its nature, the tax under consideration is valid.

Let us consider the "£24,000" paid by the company to the non-resident aliens upon the 1st of September, 1866,—which will serve as a sample for all.

At or about that date the company found itself in the possession of £24,000, which it held for non-resident aliens. That money had been produced under the protection of the United States, and was debtor therefor to whatever extent that relation equitably involves such an obligation. Also, the persons who were to profit thereby were bound in morals to answer for such protection to any reasonable extent: to the extent, that is, that people in general in like case and without regard

to residence were bound. Indeed one might think that abstractly a non-resident might owe a higher rate for protection than a resident, inasmuch as the latter is a *protector* at the same time that he is *protected*, whilst the non-resident alien is only *protected*. However, waiving that, the latter is a debtor for the protection which resulted in the creation of a *res* for the production of which he had stipulated, and which when produced was to be *his*.

This topic requires no elaboration. I shall therefore leave it, after submitting that in such matters the technical distinctions of municipal law betwixt the various ties that connect foreign capital and domestic industry, whether *agency*, *partnership*, or mere *debt*, can be of no significancy before the legislature when engaged in levying taxes. To it these are but the various *titles* of non-resident aliens to some domestic thing. Nor is it of any significancy that the thing protected is *fungible* (as the civil law speaks) or *specific*,—*in esse* or only *in embryo*, *i. e.*, having, not so much a right to life, as it were, but a mere right *to be born*—the protection being afforded to the particular right whatever it is, and being a valuable consideration from which to imply a corresponding promise.

If in this case it appears that there was a valuable consideration and corresponding implied promise which was the foundation of a statute duly authorized in such case to define the extent of the latter, then the law of attachment, above cited, comes in to show abundantly that there is a res within the sovereign jurisdiction of the United States that by "due process of law" may be subjected for *satisfaction*.

As to "due process" no question is made by the company.

There remains for examination the cases in which this form of question has been recently considered in this court.

Railroad Company *vs.* The Collector (100 U. S., 595), is plainly an authority in favor of the government here; the only difference betwixt the two cases being that there the company had paid the tax, and was seeking to recover it back, whilst here it resists payment. In that case therefore the Court could say, p. 597:

> It is urged that it is a tax upon the property—if property it may be called—of persons not subject to the jurisdiction of this government, and therefore beyond the power of Congress to levy or enforce.
>
> *That the tax was actually collected without resistance, and the present suit brought to recover it back is sufficient answer to the assertion that it could not be collected.*

Of course that particular argument that the thing taxed was within the jurisdiction of Congress is wanting here, but I submit that such deficiency is amply countervailed by the above citations to show how universally debts are treated as within the jurisdiction of the government of the debtor, for any purpose as to which that government may have asserted it.

Again, in saying that "the tax, in our opinion, is essentially *an excise* in the business of the class of corporations mentioned in the statute" the Court evidently assumes that the legislature has jurisdiction over the investment, that jurisdiction being manifestly an incident preliminary to the sort of treatment which the

transaction should receive, viz, as taxable under the head of the "business" of the corporation, or otherwise. This view applies to the present case as fully as to that of The Collector.

The Foreign-Held Bonds case (15 Wallace, 300) is one in which the Court held that it is not competent for *a State* to impose a tax like that in question now.

I have already admitted that the question there was *legal*, and not *political*, and therefore differs in point of important principles from the question here.

That case was decided with so considerable a *dissent*, that in so far as it affects the second branch of the argument here it may in a fit case be treated perhaps as having not entirely settled for this court the principles which it enunciates. It was appealed to by the learned gentleman who appeared for the taxpayer in the above case in 100 U. S., but apparently was thought by the Court to be not pertinent in that connection. It is not referred to in the Opinion. It may possibly be suggested that inasmuch as the protection of foreign creditors is in the last resort a *Federal* matter, no *consideration* exists in the case of a State for the implied promise which is at the foundation of taxation; and therefore that, in the consequent absence of an existing debt, the rulings in cases of attachment, &c. (as above), do not apply to State taxation. In any other point of view I shall content myself with submitting a consideration of the conflict between that case and the so well and so long settled principles of law—*common* as well as *civil*, *municipal* as well as *international*—which govern claims of *third persons*, and under *the imperium*, at the residence of the debtor.

I will close by observing that the language of Sir William Scott in the case of Le Louis (2 Dodson, 210), so much relied upon by the learned counsel, at pp. 34, &c., of his brief, to establish the point that the British Parliament *cannot* override international law by its legislation, was employed merely to assist in construing a statute, *i. e.*, in collecting the meaning of certain general expressions. In such cases it is usual for courts, in order to determine the significancy of statutes, to apply with strong expressions of sanction principles drawn from many quarters; principles, however, which cease to be principles of *municipal law* in the presence of plainly contradictory legislation. So fine a rhetorician as Sir William was no doubt under much temptation that common men miss, to employ in the course of his judgments many "words" which, "master" as he was, cannot safely "be sworn by." There can be no doubt of the power of the British Parliament to involve all the forces of that country, judicial and other, in supporting any assertion that it may choose to make in contradiction of international law. Whether unwise, indiscreet, immoral, or otherwise, such assertion would become municipal law. (1. Bl. Comm., 91, and Christian's note.)

Lord Coke said, perhaps when not officially called upon so to say, that Parliament *could not* constitute a man judge in his own case. That was forcibly put as a warning to legislative discretion. But the question has been shrewdly asked, *Suppose Parliament were in fact to do this, what then?*

2. The error assigned as regards the judgment upon the claim for *penalties*, is *submitted* upon the record.

S. F. PHILLIPS,
Solicitor-General.

SUPREME COURT U.S.
FILED
OCT 6 1882

SUPREME COURT of the UNITED STATES.

No. 11

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE ERIE RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT ON REARGUMENT.

WM. D. SHIPMAN,
Of Counsel for Defendant.

Supreme Court of the United States.

No. 11

THE UNITED STATES, *Plaintiff in Error,* *vs.* THE ERIE RAILWAY COMPANY.	*In Error to the Circuit Court of the United States for the Southern District of New York.*

REARGUMENT.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a suit to recover taxes alleged to be due the plaintiff, on certain interest coupons paid by the defendant on bonds issued by it, which payments were made in the years 1866, 1867, 1868 and 1869, and also to recover certain penalties alleged to be due the plaintiff, for failure of the defendant to make returns of the amount of said taxes. The suit is founded on section 122 of the Act of June 30, 1864 (*13th U. S. Statutes at Large*, pp. 284, 285), as amended by section 9 of the Act of July 13th, 1866 (*U. S. Statutes at Large*, vol. 14, pp. 138, 139).

The original and amended section of the statutes referred to are as follows:

June 30, 1864.

SEC. 122.—*And be it further enacted*, That any railroad, canal, turnpike, canal navigation, cr slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stockholders as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum; and the payment of the amount of said duty so

July 13, 1866.

That section one hundred and twenty-two be amended by striking out all after the enacting clause, and inserting in lieu thereof the following: That any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, *including non-residents, whether citizens or aliens*, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a *tax* of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and *wherever* the same shall be payable, *and to whatsoever party or person the same may be payable, including non-resi-*

deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever; except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted and the duty paid to the Commissioner of Internal Revenue within thirty days after the time when said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of the duty, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said duty. And for any default in making or rendering such list or return,

dents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons, and dividends, due and payable as aforesaid, the *tax* of five per centum; and the payment of the amount of *said tax* so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of *tax*, and there shall be annexed thereto a declaration of the President or Treasurer of the Company, under oath or affirmation, in form and manner as may be

with the declaration annexed, or of the payment of the duty as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the duty, or any part thereof, as aforesaid, the assessment and collection of the duty and penalty shall be made according to the provisions of law in other cases of neglect or refusal.

prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said *tax*. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the *tax* as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the *tax*, or any part thereof, as aforesaid, the assessment and collection of the *tax* and penalty shall be made according to the provisions of law in other cases of neglect or refusal.

That section one hundred and twenty-two be further amended, by adding thereto the following proviso:

Provided, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, *that* in such cases, the tax levied by this section shall not be paid to the United States until said companies resume the payment of interest on their indebtedness.

The material changes made by the amended section, whereby it differs from the original, are in italics.

The case was tried in District Court below on an agreed statement of facts, which is printed on pp. 8 to 13 of the Record, which is as follows:

"In the above entitled suit the following facts are hereby "agreed upon by and between the plaintiffs and defendant:

"I.—Prior to September 1, 1866, the defendant had issued "and sold, as hereinafter stated, sterling coupon bonds, "dated September 1, 1865, the principal of which was pay- "able ten years after date, and the principal and interest of "which were, by the terms of said bonds and coupons, pay- "able in London, England, at the office of Junius S. Morgan "& Co., bankers of said London, to the amount of £800,000 "sterling.

"II.—After the 1st day of March, 1868, and before the 1st "day of September, 1868, the defendant issued and sold of "the same class of bonds £200,000 sterling, the principal "and interest of which were payable at the same place as "the principal and interest of the £800,000 hereinbefore "stated.

"III.—The rate of interest on all of said sterling loan or "bonds was six per cent. per annum, payable semi-annually "on the first days of March and September in each year re- "spectively.

"IV.—Said bonds, with the coupons thereto attached, "were all sold directly to J. S. Morgan & Co., J. T. Mac- "Kenzie, and Stern Brothers, all foreign bankers, and hav- "ing their banking houses and principal places of business "in the said City of London, and by them resold to their "customers in England and on the Continent of Europe.

"V.—That during all of said years, 1866, 1867, 1868 and "1869, said bonds and coupons were all held and owned by "non-resident aliens, and not by citizens of the United States,

" except bonds to the amount of £20,000, and the coupons " thereto belonging, which latter bonds, and no more, were " held and owned by a citizen or citizens of the United States " residing in Europe.

" VI.—The amount of interest, as the same fell due on all " said bonds, was provided for, and sent forward by the de- " fendant, in one sum or block, to said J. S. Morgan & Co., " before the dates at which the same fell due, and on the re- " spective dates at which the same fell due the same was paid " by said J. S. Morgan & Co., at their banking house in Lon- " don, to the holders of the said bonds and coupons.

" VII.—The amounts and dates of said payments of in- " terest, together with the five per cent. tax, valued in cur- " rency, both at the date of each payment and the date of " the trial of this cause respectively, are as follows:

Date of Payment.	Amount of Interest.	Amount of Tax at 5 per cent.	Currency value at date of Payment of Interest.	Value in Currency at date of Trial.
" Sept. 1, 1866..	£24,000	£1,200	Sept. 1, 1866, $8,282 13	$6,228
" March 1, 1867..	24,000	1,200	March 1, 1867, 8,071 27	6,228
" Sept. 1, 1867..	24,000	1,200	Sept. 1, 1867 8,215 59	6,228
" March 1, 1868..	24,000	1,200	March 1, 1868. 8,253 19	6,228
" Sept. 1, 1868..	30,000	1,500	Sept. 1, 1868. 10,542 63	7 785
" March 1, 1869..	30,000	1,500	March 1, 1869. 9,544 71	7,785
" Sept. 1, 1869..	30,000	1,500	Sept. 1, 1869. 9,682 82	7,785
	£186,000	£9,300	$62,592 34	$48,267

" VIII.—Included in and a part of the figures embraced " in the preceding VIIth paragraph of this finding of facts " are the £20,000 sterling of bonds held and owned by a " citizen or citizens of the United States. The amounts " and dates of the payments of the interest, together with " the five per cent. tax, valued in currency, both at the date " of such payment and at the date of the trial of this cause, " are as follows:

Date of Payment.	Amount of Interest.	Amount of Tax at 5 per cent.	Currency value at date of Payment of Interest.	Value in Currency at date of Trial.
" Sept. 1, 1866..	£600	£30	$207 05	$155 70
" March 1, 1867..	600	30	201 78	155 70
" Sept. 1, 1867..	600	30	205 39	155 70
" March 1, 1868..	600	30	206 33	155 70
" Sept. 1, 1868..	600	30	210 85	155 70
" March 1, 1869..	600	30	190 89	155 70
" Sept. 1, 1869..	600	30	193 66	155 70
	£4,200	£210	$1,415 95	$1,089 90

" IX.—That the defendant made no returns to the As-
" sessor, or to any other officer of the Internal Revenue of
" the United States, of the payment of said interest, or any
" part thereof, nor did the defendant ever pay to the United
" States, or to any one on its behalf, 5 per cent. tax, or any
" tax on said interest, or any part thereof; nor did the de-
" fendant withhold said tax, or any part thereof, from the
" amount of said interest, but the defendant paid the full
" amount of said interest to the holders of said bonds, pur-
" suant to the true intent and obligation of said bonds, with-
" out any deduction whatever.

" X.—No assessment was ever made by the plaintiffs, or
" by any officer of the plaintiffs, on the defendant for any
" portion of said tax, nor was any demand ever made on
" the defendant for the payment of the same to the United
" States until December 31, 1872.

" XI.—No penalty for failure to make the return of the
" payment of said interest has ever been paid to the plain-
" tiffs, or to any one on its behalf, by the defendant.

" (Signed) GEORGE BLISS,
" *U. S. Attorney.*

" (Signed) SHIPMAN, BARLOW, LAROCQUE & MCFARLAND,
" *Attorneys for Defendant.*"

The amount of interest paid, and the several dates when the same became due and was paid, will be found in the

seventh clause of the agreed statement. The aggregate amount of interest thus paid on all the bonds is £186,000 sterling, and the aggregate amount of tax claimed by the plaintiff to be due thereon is £9,300 sterling. The aggregate amounts of the tax in currency, at the date of payment and at the date of the trial, are also severally given in the table in the seventh clause.

The agreed statement shows, that of the £186,000 sterling interest paid by the defendant, £181,800 sterling was paid in London upon interest coupons, which, with the bonds, were owned and held by non-resident aliens. The remaining £4,200 sterling interest only was paid in London upon interest coupons which, with the bonds, were owned and held by a citizen or citizens of the United States residing in Europe.

The agreed statement also concedes, that no assessment was ever made for any portion of the alleged tax, nor was any demand ever made on the defendant for any portion thereof till December 31, 1872, and that the defendant has never made any return to the assessor, or paid any penalty for failure to make return.

The District Court below held that the defendant was not liable for a tax on the £181,800 sterling paid for interest upon coupons and bonds owned and held by non-resident aliens, but was liable only for the tax on £4,200 sterling paid for interest on coupons and bonds owned and held by citizens of the United States; and the court also held, that the defendant was liable for only one penalty for failure to make return to the revenue officer of the amount paid. Judgment was rendered accordingly.

From this judgment the plaintiff carried the case to the Circuit Court, which affirmed the judgment of the District Court. From this latter judgment the present writ of error was taken.

There are but two questions presented by the record for the consideration of this court:

First.—Whether the court below erred in holding that the defendant was not liable to pay the alleged tax on the £181,800 sterling interest which defendant paid to non-resident alien owners and holders of coupons and bonds; and,

Second.—Whether the court below erred in holding that the defendant was liable for one penalty only out of the seven which the plaintiff claimed in its complaint, though this latter question is hardly raised here by the assignment of errors, and as no error on this point was alleged on the first argument of the case in this court, the question need not be discussed here; though the observations made in the original briet, and before it was known to defendant's counsel that the plaintiffs waived the point, are left in this brief as they stood in the former one.

The question, therefore, to be discussed on the present argument, is the first one.

It will be as difficult as it is believed to be unnecessary to add to the reasons given by the courts below in support of their judgments; but as the decision of the principal question in controversy (the liability of defendant for a tax on the large sum paid for interest on coupons and bonds owned

and held by non-resident aliens) was rested on principles then recently and repeatedly announced by this court, it may be instructive to examine in chronological order the cases bearing npon the point, especially as erroneous views have sometimes prevailed as to what this tribunal has decided. For convenience of reference, citations from the cases will be made at some length.

POINTS.

I.

The tax laid by the 122d section, either originally or as amended, was not a tax on the corporation, pure and simple, independent of the relation of the bondholder to the tax. An examination of the cases, as well as the statute itself, will show that, for all practical purposes, it was an income tax on the bondholder, and that the corporation indebted to him on the bonds was made the instrument of collection for the Government.

The first case in order of time is—

HAIGHT *v.* THE RAILROAD COMPANY, DEC. T., 1867, (6 WALL., 15.)

This was a suit brought by the plaintiff to recover of the defendant the five per cent. tax which the latter had deducted from the interest on bonds held by the plaintiff and paid over to the Government. The plaintiff claimed that

he was protected from the tax by a covenant in the mortgage deed of the following tenor:

"Provided, always, that if the said railway company or "their successors do well and truly pay to the said Haight "the said $100,000 on the days and times hereinbefore men- "tioned, together with the interest payable thereon, with- "out *any* deduction, defalcation or abatement to be made "of anything for or in respect of any taxes, charges or as- "sessments whatsoever, then," &c.

According to the preliminary statement of the reporter, the argument in the court below on behalf of the plaintiff appears to have been, that "from a very critical examination of the different parts of the act of Congress in question, * * * the tax of five per cent. laid in the 122d section was a tax upon the *coupon* or *interest*, that is to say, a tax on the *thing*, and not on Haight's income; and, therefore, that under the contract in the mortgage, it was to be paid by the company from its own property and not from Haight's."

The same argument was evidently urged before this court. The court below rejected this view, and held that it was not a tax on the company in any sense, but a tax on the income of the bondholder. That decision was unanimously affirmed by this court.

Mr. JUSTICE GRIER, in delivering the opinion of the court, said (p. 18):

"The provision in the condition of defeasance of the "mortgage has reference only to covenants between mort- "gagor and mortgagee, and is usual in every mortgage; "being put there in order to secure the mortgagee, who "may not be in possession, from demand for taxes

" incurred while the mortgagor was in possession. It can " have no possible application to the *income tax of bondhold-* " *ers*. The 122d section of the Revenue Act of 1864 was " enacted for greater facility of collection of the tax. " These corporators often contract to pay for the bond- " holder all such taxes; but when they have not so con- " tracted, they are authorized to deduct or withhold the " amount of the tax. In all assessments of income tax, the " citizen is credited with the amount thus detained; so that " there is no double taxation."

The next case bearing on the question is

RAILROAD COMPANY *vs.* JACKSON, DEC. T., 1868 (7 WALL., 262).

In this case suit was brought by an alien resident in Ireland, to recover of the defendant the tax which it had deducted from the interest on bonds held by him. The controversy originated before the amendment of the 122d section. The opinion of the court was delivered by Mr. JUSTICE NELSON, who said (p. 268):

" The next question is, whether or not the coupons were " subject to a tax of five per centum per annum to the " United States on the 1st of July, 1865, when they became " due?

" The act in force when the coupons in question fell due, " was the Act of June 30, 1864, and is the one by which the " tax of five per centum claimed on the bonds of the plain- " tiff must be determined. The court below held, that the " act did not include a non-resident alien, and directed a " verdict and judgment for the whole amount of interest. " The decision was placed mainly on the ground that, look- " ing at the several provisions bearing upon the question, " and giving to them a reasonable construction, it was be- " lieved not to be the intent of Congress to impose an income

"tax on non-resident aliens; that they were not only not in-
"cluded in the description of persons upon whom the tax
"was imposed, but were impliedly excluded by confining it
"to residents of the United States and citizens residing
"abroad, and that the deduction from the prescribed in-
"come of the interest on these railroad bonds, when paid by
"the companies, was regarded as simply a mode of collect-
"ing this part of the income tax. We concur in this view.
"It is not important, however, to pursue the argument, as
"Congress has since, in express terms, by the Acts of March
"10 and July 13, 1866, imposed a tax on alien non-resident
"bondholders. *The question hereafter will be, not whether*
"*the laws embrace the alien non-resident holder, but whether it*
"*is competent for Congress to impose it; upon which we express*
"*no opinion.*"

This decision affirmed the one below giving judgment for the plaintiff.

As some diversity of opinion among the members of this court is disclosed in this and subsequent cases, it may be well to note here that JUSTICES CLIFFORD and SWAYNE dissented from the majority.

The next case in order of time is

BARNES *vs.* THE RAILROADS, DEC. T., 1872 (17 WALL., 294).

As some erroneous conclusions were at one time current as to what a majority of the court decided in these cases, a particular examination of these opinions will be pertinent here, so far as they relate to the point now under consideration. There were several questions discussed and decided, which need not be noticed here. The precise questions decided by the court are well stated in the language of the reporter (pp. 298, 299), as follows:

"The question in the cases was, whether the duration of "the tax upon 'interest or coupons, dividends or profits,' of "railroad, canal and other companies, imposed by the 122d "section, quoted above, was subject to the limitation fixed by "the 119th section, taken in connection with the 116th sec- "tion. In other words, whether a tax upon the profits, in- "terest or dividends, mentioned in the said 122d section, "was authorized to be assessed and collected, where such "profits were set apart, or where such interest or dividends "became due and payable *after* the 31st of December, 1869, "and especially as in the second of the above-mentioned "cases, where the dividend was declared after that date. "The Government contended that the limitation referred "to was not applicable to the tax described in the 122d sec- "tion, and that the assessment and collection thereof, upon "interest, dividends, &c., due and payable subsequent to "that date, were authorized; a position denied by the rail- "road companies and their stockholders and creditors.

"The court below was of opinion that the tax was not "authorized, and gave judgment accordingly. From that "judgment the collector brought the cases here.

"In this court the cases were twice argued. On the first "argument, the court being then composed of eight judges, "there was an equally divided bench. After the accession "of Mr. Justice Hunt, a new argument was ordered."

It is unnecessary here further to refer to the questions *actually decided* by a majority of the court in these cases of *Barnes* vs. *The Railroads*, as they have no bearing on the point which the court is to dispose of. The opinion of the court was delivered by Mr. JUSTICE CLIFFORD, and attention is called to the following (pp. 304, 305):

"Different regulations for the assessment and collection of "the income taxes of every kind were prescribed in the prior "laws imposing internal revenue duties, but they were not "in all respects satisfactory, and many controversies had "arisen calling in question the action of the revenue officers

" in their efforts to enforce the collection of that branch of " the public revenue. Contrariety of decision had resulted " in some instances, and the Circuit Court had decided in " one case that a railroad company could not deduct and " withhold the amount of such a tax from a dividend due " and payable to a non-resident alien, the presiding justice " being of opinion that the language of the prior act did not " warrant the conclusion that Congress intended to include " such holders of the bonds or certificates in the category of " persons liable to such an assessment.

" Congress, accordingly, in order to remove those difficul- " ties, imposed the tax upon the railroad company, and en- " acted that the company should pay the same whenever " and wherever the dividend should be payable, and to " whatsoever party or person the same should belong, show- " ing beyond the possibility of doubt that Congress intended " to hold the railroad company absolutely and solely liable " for the tax, reserving to the company the right, which is " equally unqualified, of deducting and withholding from " the dividend the amount of the tax, whether the divi- " dend was due or payable to the stockholder before or " subsequent tothe payment of the tax, and wholly irrespect- " ive of the question whether the stockholder was a resi- " dent or non-resident, or citizen or non-resident alien.

" Payment of the tax by the company is an absolute re- " quirement, just as much so as if the company was the ac- " tual holder of the bonds and the real owner of the divi- " dends, whether they deduct and withhold the amount from " the dividends or not, and the fact that the company is per- " mitted to do so if they see fit, does not, in the slightest " degree, change the relation of the company to the United " States as the tax-payers under that section of the law im- " posing internal revenue duties."

Contrary to what was supposed when this opinion was first promulgated, the remarks above cited were not concurred in by a majority of the court. This will be seen from the fact that, including Mr. JUSTICE BRADLEY, there was a

majority of only one in support of the judgment rendered. The concurrence of Mr. JUSTICE BRADLEY was special and limited, and did not embrace the doctrine contained in the passages already cited from the opinion, as will be seen by the following (p. 310):

"BRADLEY, *J.*: I concur in the judgment of the court, on "the ground that the 119th section of the Internal Revenue "Act, in affixing a limit to the period for imposing and col- "lecting the income tax, referred, in express terms, only to "the annual tax returnable and payable by individuals, and "to no other tax imposed by the act."

It will, therefore, be seen that the learned justice limited his concurrence to the construction given to the 119th section, limiting the period when the tax would expire.

We are aware of the language of Mr. JUSTICE STRONG, in his dissenting opinion (p. 319), concurred in by the CHIEF JUSTICE, and JUSTICES DAVIS and FIELD. He says (p. 319):

"*But the opinion of the majority of my brethren*, that by "the 122d section Congress intended to tax the railroad "companies for *their* gains, profits and income, and not to "tax their bondholders and shareholders, leads to a very "remarkable result. The interest due from the companies "to their creditors—interest which accrued in 1869—is "treated as income of the *companies* for that year, and they "are taxed for it. Such is the effect of the judgments en- "tered. The companies are compelled to pay an income "tax, not upon what they received, but upon what they "were obliged to pay to their creditors. A construction "of the Act of Congress that leads to such a result can- "not be right."

This doctrine thus attributed by the learned justice to the *majority of the court* was, in fact, held only by less than a

majority, as will be still more clearly seen by the concurring opinion of Mr. JUSTICE BRADLEY in the next case in the same volume. (17 *Wall.*, 333.)

"Mr. JUSTICE BRADLEY: I concur in the judgment of "the court in this case, without deciding whether Congress "can or cannot tax the property of municipal corporations. "I concur in the judgment, on the ground that Congress "did not intend, by the internal revenue laws, to tax prop- "erty belonging to the States or to municipal corporations. "This is apparent from the language of the 116th section of "the Internal Revenue Act of 1864. *I also concur in the "construction given by the opinion to the Internal Revenue Act, "that the tax imposed by the 122d section of that act was sub- "stantially a tax on the stock and bondholders, and not on the "railroad or canal companies.*"

The error in assuming that the doctrine we have cited from the prevailing opinion in *Barnes* vs. *The Railroads*, was concurred in by the majority of the court, no doubt arose from the fact, that Mr. JUSTICE BRADLEY'S limited concurrence in that case was not read at the time that the prevailing and dissenting opinions were, but was filed subsequently.

In the majority who concurred in the judgment in *Barnes* vs. *The Railroads*, was also Mr. JUSTICE HUNT, who delivered the opinion of the court in the next case, in the same volume, *United States* vs. *Railroad Company* (17 *Wall.*, 322). That he did not concur in the doctrine set forth in those passages which we have cited from the opinion delivered by Mr. JUSTICE CLIFFORD, is quite evident from his opinion just referred to.

This brings us to the next case in order—the one last referred to above:

UNITED STATES *vs.* RAILROAD COMPANY—DEC. T., 1872 (17 WALL., 322).

The question which arose in that case is thus briefly and accurately stated by the reporter (p. 324):

"After the passage of the Internal Revenue Laws, the "122d section of which is above quoted, the Government "claimed payment from the company of a tax of five per "cent., which the collectors of the Federal revenue alleged "that under the plain language of the above quoted 122d "section, the company was bound to withhold from the city "and pay to the United States. The company refused so to "pay the five per cent. to the Government, on the ground "that the tax was not a tax laid on it, the company, but one "laid on their creditor, the City of Baltimore, and that that "city, being a municipal corporation, could not have its "revenues taxed by the Federal Government.

"The United States accordingly sued the company in the "court below, in assumpsit."

In delivering the opinion of the court, Mr. JUSTICE HUNT remarked as follows:

"The defendants insist, firstly, that the section in question "does not lay a tax upon the corporations therein named, "and by whom the tax is payable upon their own account, "but uses them as a convenient means of collecting the tax "from the creditor or stockholder, upon whom the tax is "really laid. They insist, as a consequence, secondly, that "the present is a tax upon the revenues of the City of Bal-"timore; and, thirdly, that it is not within the power of "Congress to tax the income or property of a municipal "corporation.

"1. The case of *The Railroad Company* vs. *Jackson*, decided

" in 1868, and *Haight* vs *Railroad Company*, are authorities " in support of the first proposition."

* * * * * * *

" This is a clear, distinct, unqualified adjudication, by the " unanimous judgment of this court, that the tax imposed " by the 122d section, is a tax imposed upon the *creditor or* " *stockholder therein named;* that the tax is not upon the cor- " poration, and that the corporation is made use of as a con- " venient and effective instrument for collecting the same. " It is a sequence in logical connection with that provision " of section 117, which specifies as the subjects of individual " taxation, all the earnings, profits, gains and income from " whatever source derived, and whether divided or not, " *except* the amount derived from the sources indicated in " the 122d section. Of the income specified in section 117, " the individual must make specific returns and be directly " taxed thereon. Upon or for the incomes received from " the sources mentioned in section 122, no tax is directly " imposed upon the owner. That tax is to be returned by, " and collected from, the corporation, *as his agent and in-* " *strument.*"

" A tax is understood to be a charge, a pecuniary burden, " for the support of Government. Of all burdens imposed " upon mankind, that of grinding taxation is the most cruel. " It is not taxation, that Government should take from one " the profits and gains of another. That is, taxation which " compels one to pay for the support of the Government " from his own gains and of his own property.

" In the cases we are considering, the corporation parts " not with a farthing of its own property. Whatever sum " it pays to the Government is the property of another. " Whether the tax is 5 per cent. on the dividend or interest, " or whether it be 50 per cent., the corporation is neither " richer nor poorer. Whatever it thus pays to the Govern- " ment, it by law withholds from the creditor. If no tax " exists, it pays 7 per cent., or whatever be its rate of inter- " est, to its creditor in one unbroken sum. If there be a tax, " it pays exactly the same sum to its creditor, less 5 per " cent. thereof, and this 5 per cent. it pays to the Govern- " ment. The receivers may be two, or the receiver may " be one, but the payer pays the same amount in either

"event. *It is no pecuniary burden upon the corporation, and* "*no taxation of the corporation. The burden falls on the cred-* "*itor. He is the party taxed.*

"In the case before us, this question controls its decision. "If the tax were upon the railroad, there is no defense; it "must be paid. But we hold that the tax imposed by the "122d section is *in substance and in law a tax upon the income* "*of the creditor or stockholder, and not a tax upon the cor-* "*poration.*"

The concurring opinion of Mr. JUSTICE BRADLEY has already been given on page 16 of this brief.

JUSTICES CLIFFORD and MILLER dissented in this case.

Appended to this case is the following report of a motion, and the judgment of the court thereon (17 *Wall.*, p. 335):

"Soon after the opinion of the court in the preceding case "was delivered, a motion was made by Messrs. *Gowen*, *Bid-* "*dle*, and *Cuyler*, the counsel of the different railroad com- "panies, in the case of *Barnes* v. *Railroad Companies*, decided "five weeks before it, for a rehearing of that case; the "grounds of the motion being the obvious and irreconcil- "able contradiction between the language in one of the "opinions given in the first case (see *supra*, pp. 302-3, 309)— "which opinion the learned counsel assumed to be the opin- "ion of the court—and the opinion of the court in the sec- "ond case (see *supra*, pp. 326-27); a contradiction which the "counsel exhibited by a juxtaposition of passages in the two "opinions.

"And now, April 28th, 1873, the Chief Justice announced "the order of the court denying the motion."

To the above the reporter has added the following note (pp. 335-36):

"No reasons were assigned for the order. The reader "will have perceived, probably, that notwithstanding the in-

"consistency of language in the opinion relied on by coun-
"sel in the former case, with that expressing the opinion of
"the court in the latter, the *judgments of the court* in the two
"cases are in no way inharmonious. And the reporter has
"already noted in his syllabus of the former case that the
"judgment in it was given by a court nearly equally divided,
"and that the majority of the court who agreed in the judg-
"ment did not agree in the grounds of it."

This statement by the reporter is strictly accurate and quite obvious. The *judgments* were not inconsistent with each other. The motion of the counsel for a rehearing of *Barnes* v. *The Railroads* was founded on the erroneous assumption that the construction given to the 122d section by Mr. JUSTICE CLIFFORD, was concurred in by the majority of the court. We have demonstrated that such was not the fact, but that the judgment in that case was concurred in on other and different grounds.

It is needless to remark that the question now under discussion was directly presented and decided in United States *v.* Railroad Company, and that a majority of the court held that the tax imposed by the 122d section was a tax, not on the company *per se*, or its property, to be paid out of its own funds, but a tax on the income of the shareholder received by him in the shape of dividends. Otherwise, the whole discussion of the question whether Congress can tax the revenues of a State municipal corporation, was utterly irrelevant, and its decision by this court wholly gratuitous and out of place; for if the court had held that the tax was on the company instead of on the income of the shareholder, the question whether Congress could lawfully tax the revenues of a municipal corporation of a State would have disappeared from the case.

From the foregoing examination of the cases, it will be seen that a majority of this court, notwithstanding the language we have cited from the prevailing opinion in Barnes *v.* The Railroads, has invariably maintained that the tax imposed by the 122d section of the act was a tax, not on the corporations, but on the income of the bond or stockholder.

The next case in order is

STOCKDALE *v.* THE INSURANCE COMPANIES, OCT. T., 1873 (20 WALL., 323).

The precise questions involved in that case are stated by the reporter (pp. 326, 327). After citing the statutes bearing upon the general subject, the reporter adds

"In this state of statutory enactment, Stockdale, collector "of internal revenue at New Orleans, assessed a tax on the "Atlantic Insurance Company (and on certain other insur- "ance, railroad, and banking companies of that city), 'on the "earnings which had accrued to said company between the "5th day of July, 1869, and the 30th day of June, 1870.' The "dividend was declared after this latter date. The taxes "were paid under protest, and the companies having brought "suits in the court below to recover them, and having there "got judgments against the collector for them, that officer "brought the cases here by the present writ of error.

"Two questions accordingly arose here:

"1. Was the tax valid as to that part of the dividend "which arose from the earnings of the year 1869?

"2. Was it valid as to that part which arose from the "earnings of the year 1870?"

In the opinions delivered, the question now under consideration was naturally drawn into the discussion, though the case involved another important point which was discussed at greater length, and which it is not necessary to dwell on here. But we cite all that portion of the prevailing and dissenting opinions which bear on the question now under consideration. There were three opinions delivered in that case: one by Mr. JUSTICE MILLER, in which it is obvious that JUSTICES CLIFFORD, SWAYNE, and HUNT concurred; one by Mr. JUSTICE BRADLEY, with whom concurred the CHIEF JUSTICE, and both of whom concurred in the judgment rendered, but upon grounds different from those stated by Mr. JUSTICE MILLER; and one by Mr. JUSTICE STRONG, in which JUSTICES DAVIS and FIELD concurred, dissenting from the judgment.

In that delivered by Mr. JUSTICE MILLER, it is said (p. 329):

"An agreed statement of fact shows that the taxes com-
"plained of were assessed upon dividends declared by the
"insurance company, 'on the earnings which had accrued
"to said company between the 5th day of July, 1869, and
"the 30th day of June, 1870;' and the dividend was declared
"after the latter date.

"This short statement raises two questions:

"1. Was the tax valid as to so much of the dividend as
"arose from the earnings of the year 1869?

"2. Was it valid as to that which arose from the earnings
"of the year 1870?"

"As regards the first proposition, it was much considered
"in the Barnes cases. It was argued in those cases with
"much ability, and four members of the court were of that

" opinion, that the entire income tax expired with the year " 1869, and that as the tax in those cases, as in these, was " assessed on dividends declared in the year 1870, they were " without authority of law.

" The argument in those cases, so far as the opinion of the " court was concerned, turned mainly on the question " whether the law intended to impose the tax on the income " of the corporation, in which case it was obviously the in- " come of 1869, which was taxed, and therefore properly " taxed, or on the income of the stockholder, ascertained by " his dividend, in which case the minority of the court " thought that dividends declared in 1870 were not liable to " the tax, because the taxing power under the law expired " with the preceding year. It is, perhaps, fairly inferable " from the report of those cases, and the opinion in the sub- " sequent case of *The United States* vs. *Baltimore and Ohio* " *Railroad Company*, that among those who composed the " majority in the Barnes cases, there were some shades of " difference in the precise grounds on which the validity of " the taxes rested.

" Without reopening that subject for an inquiry into those " differences, it may be said that the question whether the " tax was in those cases, a tax on the shareholder or on the " corporation was, and is, one of form rather than sub- " stance.

" The tax is imposed by the statute alike on all dividends " declared, and on all undistributed earnings of the corpora- " tion, and it is made the duty of the corporation to pay it.

" It is also made the duty of the corporation to make re- " turns of these dividends and undivided earnings to the " proper internal revenue officer, under a heavy penalty.

" In the case of dividends declared, the corporation is au- " thorized to deduct the amount of the tax from the dividend " due to the shareholder, before paying it to him.

" *And it follows from this, that when a dividend is declared* " *to any shareholder whose dividend is, for any special reason,* " *exempt from such tax, as in the case of the City of Balti-* " *more on her stock in the railroad company, then the corpora-* " *tion declaring the dividend is not liable.*"

" The effect of such a tax on the shareholder is the same,

" whether it be considered a tax on his share for the divi-
" dend earned by his share, or on the corporation on account
" of said earnings. And it is the same, whether the tax is
" imposed on the undivided earnings, or on those earnings
" after they have been divided. *He, in any and all these*
" *cases, in point of fact, ultimately suffers to that extent, or*
" *loses the amount of the tax.* We are of opinion that the
" statute intended to tax those earnings for the year 1869,
" whether divided or undivided, and that the tax now in
" question is to that extent valid."

In the concurring opinion of Mr. JUSTICE BRADLEY and the CHIEF JUSTICE (p. 334), it is said: "The taxes imposed by sections 120 and 122 on banks, insurance, railroad and canal companies (which were never included in the annual income tax, but expressly excluded or excepted therefrom), may be, as in the Baltimore and Ohio Railroad case *we decided they were, substantially, taxes on the stockholders and bondholders, though nominally and in form imposed on the companies.*"

From these views of the majority of the court, it is clear that, whether in form the tax is laid on the corporation, or on the creditor or stockholder, is of no practical importance. In substance it is a tax on the latter, the former being the intermediate instrument of the Government for its collection. On this point the dissenting opinion of Mr. JUSTICE STRONG, concurred in by JUSTICES DAVIS and FIELD (pp. 336 and 337), is still more emphatic. It declares:

" I dissent from the judgments given in these cases, and
" from the reasons assigned in support of the judgments. If
" it ever was claimed, it is no longer contended by any one,
" that the tax on dividends and Federal salaries, for the col-
" lection and payment of which provision was made by the
" 120th, 122d and 123d sections of the Internal Revenue Act

" of 1864, and its amendments, was not a tax upon income, " and a part of the income tax levied by the 116th section " of the act. And notwithstanding what was decided in " *Barnes* vs. *The Railroads*, I regard it as having been settled " by the *subsequent case of The United States* vs. *The Balti-* " *more and Ohio Railroad Company*, that the tax on dividends " declared and interest payable by the companies mentioned " in the 122d section, was a tax upon the stockholders and " bondholders of the companies, and not a tax upon the cor- " porations. Of this opinion were all the judges of this " court except two. Though the corporations were, by the " law, made agents of the Government for collecting it and " paying it over, the tax itself was ruled to be a part of the " income tax of the persons entitled to the interest or " dividends."

On the former argument of the present case, counsel for the defendant in error was asked by one of the justices, why, if the exposition of the cases then presented by him was the correct one, was there any dissent in the Barnes and Stockdale cases? The answer is that the dissenting opinions rested on the ground that the tax on interest and dividends expired at the same time that the tax on that portion of the income of individuals which the latter were called upon to return and pay personally did. The dissenting JUSTICES did not recognize as valid the distinction taken by Mr. JUSTICE BRADLEY, and stated in his brief concurring opinion in the case of *Barnes* vs. *The Railroads*, viz.: " That the " 119th section of the Internal Revenue Act, in affixing a " limit to the period for imposing and collecting the in- " come tax, referred, in express terms, only to the annual " tax returnable and payable by individuals, and to no other " tax imposed by the act."

On the contrary, the doctrine of the dissenting opinion in

Stockdale v. *The Insurance Companies*, is that there was no distinction, that the limit fixed at which the income tax was to expire applied both to the tax on the income returned by the individual and paid directly by him, and to that withheld by the corporations and deducted from his interest or dividends. This was the main point in the case, and had this view prevailed the judgment would have been exactly the reverse of what it was.

Of course, it is superfluous to remark that the case of *Stockdale* v. *The Insurance Companies* did not overrule or restrict the doctrine laid down in *United States* v. *Railroad Company* (17 Wall., 324); or the prior cases which maintain substantially the same doctrine on the point now under consideration.

It follows from these decisions, that under the construction of the 122d section by the court, the tax sought to be collected of the defendant in this case is practically a tax on the holders of the bonds and coupons, and not a tax on the defendant. Upon this understanding of the law the answer or plea in the case now under consideration was framed and the case tried.

[We have not overlooked the case of the *Railroad Company* v. *Rose*, 95 U. S., p. 78. But it is only necessary to observe in regard to that case, that it merely affirmed the doctrines laid down in the case of *Stockdale* v. *The Insurance Companies*, That affirmance, of course, did not obliterate any qualifications which are to be found in the latter case. *Railroad Co.* v. *Rose* is, therefore, merely cumulative, and leaves the question under consideration just where *Stockdale* v. *The Insurance Company* left it.]

II.

The agreed statement in the present case is to the effect that all the bonds and coupons thereto attached were, by their terms, payable in London at the office of Junius S. Morgan & Co., that they were originally sold directly to Morgan & Co. and other foreign bankers in the City of London, and by them resold to their customers in England and on the continent of Europe, and that during all the years for which the taxes in the present suit are sought to be recovered, these bonds and coupons were, with the exception of bonds to the amount of $20,000 and the coupons thereto belonging, all held and owned by non-resident aliens, and not by citizens or residents of the United States.

The agreed statement of facts also states that the amount of interest, as the same fell due on all said bonds, was provided for and sent forward by the defendant in one sum or block to said J. S. Morgan & Co., before the dates at which the same fell due, and on the respective dates at which the same fell due the same was paid by said J. S. Morgan & Co., at their banking house in London, to the holders of the said bonds and coupons.

It will, therefore, be seen that the whole amount of interest paid while the 122d section as amended was in force, was £186,000 sterling. Of this sum only £4,200 sterling was paid upon coupons and bonds belonging to citizens of the United States. All the remainder—£181,800 sterling—went to non-resident aliens, who owned and held the bonds at the date of the several payments. The whole issue of £1,000,000 was, from the beginning, owned and held abroad, and

all the interest was paid in London. On all these points the agreed statement is explicit.

No question is made as to the liability of the defendant to recover the tax on £4,200 sterling interest paid to American citizens, as adjudged by the court below.

III.

This brings us to the main question in this case, viz.; whether the court below erred in adjudging the defendant not liable for the tax on £181,000 sterling interest paid to the non-resident aliens.

It, of course, must be conceded that the statute includes, *eo nomine*, non-residents as well as residents, aliens as well as citizens. Its language is equally full and comprehensive in regard to both classes. But as we have shown that this court, in *Stockdale* v. *Insurance Companies* and in the *United States* v. *Railroad Company* already cited, has declared that where the individual bondholder is not liable to be taxed on the interest due him, then no tax can be collected from the corporation. In other words, no tax is laid where the company has no right to withhold the amount from the creditors.

The contrary doctrine would be repugnant to reason and shock the dullest sense of justice. It would place the Government in the attitude of making the corporations its instruments for the collection of taxes due from those liable to pay them, and then make the same instruments supply any deficiency which might arise from want of taxable subjects.

Nevertheless, it was contended by the plaintiff in error in this case below, that the tax is laid on the non-resident alien, and that the company, therefore, is authorized to withhold it, and consequently is liable for the amount.

We are, therefore, confronted with the naked question, whether it is within the power of Congress to tax the income of non-resident aliens derived from the debts due them by American corporations. If so, it has the power to impose an income tax on citizens of the whole world to whom those of the United States owe debts or pay interest, *and compel the latter to pay it.*

To state such a proposition is to answer it. But we add:

1. It is a fundamental principle that the power of taxation of every government is limited to the persons and property within its jurisdiction. It may tax the real estate within its territory owned by aliens residing abroad. It may, within certain limits, tax the personal property of non-resident aliens within its dominion, such as merchandise and chattels in use, or having a *situs* therein.

2. No such power as the plaintiff in this case contends for is or could be expressly conferred on the United States by the Federal Constitution, and none springs by implication from that instrument; for,

3. No such power can be implied as an attribute of sovereignty. This court, in common with many others, has held that the taxing power is an incident of sovereignty, but is coextensive only with the subjects within its jurisdiction. No civilized government at the time the Federal Constitution was adopted, claimed a more extensive power. None,

unless it be the United States, claims it now, or has ever claimed it, and to hold that the mere creation of the Government of the United States, clothed it with a power far transcending the fundamental maxims and universal practice of civilized States, touching a matter common to all nations, would be extraordinary doctrine, even in this age of novelties. The limitation of the taxing power of all governments to subjects and property within their jurisdiction will be considered at length under another head.

As to taxing debts owing to foreign creditors, a recent writer remarks:

"These are conceded or adjudged principles, and have "ceased to be the subject of discussion or argument. Cor- "porations, it is also conceded, may be taxed like natural "persons on their property and business. But debts owing "to foreign creditors by either corporations or individuals, "are not the subject of taxation. The creditor cannot be "taxed, because he is not within the jurisdiction, and the "debts cannot be taxed in the debtor's hands, through any "fiction of the law which is to treat them as being, for this "purpose, the property of the debtors. They are not prop- "erty of the debtors in any sense; they are the obligations "of the debtors, and only possess value in the hands of the "creditors. With them they are property, 'but to call them "property in the hands of the debtors, is simply to misuse "terms.'"

Cooley on Taxation, pp. 15, 16.

Any other doctrine would lead to the surprising result already named, viz.: it would authorize the levy of an income tax by the Federal Government upon every dollar of interest paid by residents to non-resident aliens. Debts due from individuals, as well as corporations, to foreign creditors would be within the sweep of this power.

IV.

But on this subject we are not left to float on the current of general principles or the *dicta* of text-books. This court, in the case of *Railroad Co.* v. *Pennsylvania* ("*State tax on Foreign held Bonds*," 15 *Wall.*, 300), has laid down the true doctrine, from which the judgment of the court below in this case followed as an irresistible deduction.

Before citing from that case, it should be remarked that the judgment of the court rested on two distinct grounds, each of which is sufficiently broad and solid to support it. One ground was that the law of Pennsylvania, under which the tax was levied, impaired the obligation of the contract between the corporation and the bondholder. The other ground was, that the taxing power of a State could have no extra territorial operation. The reasoning of the court in support of this last proposition furnishes a conclusive answer to the claim made by the plaintiff in the present case. We, therefore, for convenience, cite it here at some length. The syllabus of the report (15 *Wall.*, 300) accurately states the points decided as follows:

"1. The power of taxation of a State is limited to persons, property and business within her jurisdiction. All taxation must relate to one of these subjects.

"2. Bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the State in which the company was incorporated, they are property beyond the jurisdiction of that State. A law of Pennsylvania, passed on the 1st of May, 1868, which requires the treasurer of a company incorporated and doing business in that State, to retain five per cent. of

" the interest due on bonds of the company, made and pay-
" able out of the State to non-residents of the State, citizens
" of other States, and held by them, is not, therefore, legit-
" imate exercise of the taxing power of the State. It is a
" law which interferes between the company and the bond-
" holder, and under the pretence of levying a tax, impairs
" the obligation of the contract between the parties.

" 3. The exemption from taxation by the State of Penn-
" sylvania of bonds thus issued to and held by non-residents
" of that State, citizens of other States, is not affected by
" the fact that the bonds are secured by a mortgage, exe-
" cuted simultaneously with them, upon property situated
" in that State. A mortgage there, though in the form of a
" conveyance, is a mere security for a debt, and transfers no
" estate in the mortgaged premises. It simply creates a
" lien upon them, and only confers upon the holder, or the
" party for whose benefit the mortgage is given, a right to
" proceed against the property mortgaged upon a given
" contingency to enforce the payment of his demand. This
" right has no locality independent of the party in whom it
" resides.

" 4. The tax laws of a State can have no extra territorial
" operation, nor can any law of a State, inconsistent with
" the terms of a contract made with or payable to parties
" out of the State, have any effect upon the contract whilst
" it is in the hands of such parties or other non-residents of
" the State."

Mr. JUSTICE FIELD, after stating the question before the court, says (p. 318):

" The case before us is similar in its essential particulars
" to that of the *Railroad Company* v. *Jackson*, reported in
" *7th Wallace*. There, as here, the company was incorpor-
" ated by the Legislatures of two States, Pennsylvania and
" Maryland, under the same name, and its road extended in
" a continuous line from Baltimore, in one State, to Sun-
" bury in the other. And the company had issued bonds

" for a large amount drawing interest, and executed a mort-
" gage for their security upon its entire road, its franchises
" and fixtures, including the portion lying in both States.
" Coupons for the different instalments of interest were at-
" tached to each bond. There was no apportionment of the
" bonds to any part of the road lying in either State. The
" whole road was bound for each bond. The law of Penn-
" sylvania, as it then existed, imposed a tax on money owing
" by solvent debtors of three mills on the dollar, of the
" principal, payable out of the interest. An alien resident
" in Ireland was the holder of some of the bonds of the
" railroad company, and when he presented his coupons for
" the interest due thereon, the company claimed the right
" to deduct the tax imposed by the law of Pennsylvania,
" and also an alleged tax to the United States. The non-
" resident refused to accept the interest with these deduc-
" tions, and brought suit for the whole amount in the Cir-
" cuit Court of the United States for the District of Mary-
" land. That court, the Chief Justice presiding, instructed
" the jury that if the plaintiff, when he purchased the bonds,
" was a British subject, resident in Ireland, and still resided
" there, he was entitled to recover the amount of the cou-
" pons without deduction. The verdict and judgment were
" in accordance with this instruction, and the case was
" brought here for review.

" This court held that the tax, under the law of Pennsyl-
" vania, could not be sustained, as to permit its deduction
" from the coupons held by the plaintiff would be giving
" effect to the acts of her Legislature upon property and
" effects lying beyond her jurisdiction.

" The reasoning by which the learned justice who deliv-
" ered the opinion of the court reached this conclusion may
" be open, perhaps, to some criticism. It is not perceived
" how the fact that the mortgage given for the security of
" the bonds in that case covered that portion of the road
" which extended into Maryland could affect the liability of
" the bonds to taxation. If the entire road upon which the
" mortgage was given had been in another State, and the
" bonds had been held by a resident of Pennsylvania, they
" would have been taxable under her laws in that State. It

" was the fact that the bonds were held by a non-resident " which justified the language used, that to permit a deduc- " tion of the tax from the interest would be giving effect to " the laws of Pennsylvania upon property beyond her juris- " diction, and not the fact assigned by the learned justice.

" The decision is, nevertheless, authority for the doctrine " that property lying beyond the jurisdiction of the State is " not a subject upon which her taxing power can be legiti- " mately exercised. Indeed, it would seem that no adjudi- " cation should be necessary to establish so obvious a prop- " osition.

" The power of taxation, however vast in its character " and searching in its extent, is necessarily limited to sub- " jects within the jurisdiction of the State. These subjects " are persons, property and business. Whatever form taxa- " tion may assume, whether as duties, imposts, excises or " licenses, it must relate to one of these subjects. It is not " possible to conceive of any other, though, as applied to " them, the taxation may be exercised in a great variety of " ways. It may touch property in every shape, in its " natural condition, in its manufactured form, and in its va- " rious transmutations; and the amount of the taxation may " be determined by the value of the property, or its use, or " its capacity, or its productiveness. It may touch business " in the almost infinite forms in which it is conducted, in " professions, in commerce, in manufactures and in trans- " portation. Unless restrained by provisions of the Federal " Constitution, the power of the State as to the mode, form " and extent of taxation is unlimited, where the subjects to " which it applies are within her jurisdiction. Corporations " may be taxed like natural persons upon their property " and business; but debts owing by corporations, like debts " owing by individuals, are not property of the debtors in " any sense. They are obligations of the debtors, and only " possess value in the hands of the creditors. With them " they are property, and in their hands they may be taxed. " To call debts property of the debtors, is simply to misuse " terms. All the property there can be in the nature of " things in debts of corporations, belongs to the creditors " to whom they are payable, and follows their domicile

" wherever that may be. Their debts can have no locality " separate from the parties to whom they are due. This " principle might be stated in many different ways, and " supported by citations from numerous adjudications; but " no number of authorities and no forms of expression could " add anything to its obvious truth, which is recognized " upon its simple statement.

" The bonds issued by the railroad company in this case " are undoubtedly property, but property in the hands of " the holders, not property of the obligors. So far as they " are held by non-residents of the State, they are property " beyond the jurisdiction of the State.

* * * * * * *

" The case of *Maltby* vs. *The Reading and Columbia Rail-* " *road Company*, decided by the Supreme Court of Pennsyl- " vania in 1866, was referred to by the Common Pleas in " support of its ruling, and is relied upon by counsel in sup- " port of the tax in question. The decision in that case " does go to the full extent claimed, and holds, that " bonds of corporations held by non-residents are taxable in " that State. But it is evident, from a perusal of the opin- " ion of the court, that the decision proceeded upon the " idea that the bond of the non-resident was itself property " in the State, because secured by mortgage on property " there. 'It is undoubtedly true,' said the court, 'that the " 'Legislature of Pennsylvania cannot impose a personal tax " 'upon the citizen of another State, but the constant prac- " 'tice is to tax property within our jurisdiction which " 'belongs to non-residents.' And again; 'There must be " 'jurisdiction over either the property or the person of the " 'owner, else the power cannot be exercised; but when " 'the property is within our jurisdiction, and enjoys the " 'protection of our State Government, it is justly taxable, " 'and it is of no moment that the owner, who is required " 'to pay the tax, resides elsewhere.' There is no doubt of " the correctness of these views. But the court then pro- " ceeds to state, that the principle of taxation as the cor- " relative of protection is as applicable to a non-resident as " to a resident; that the loan to the non-resident is made " valuable by the franchises which the company derived

" from the commonwealth, and as an investment rests upon
" State authority, and therefore ought to contribute to the
" support of the State Government. It also adds that
" though the loan is for some purposes subject to the law
" of the domicile of the holder, 'yet, in a very high sense,'
" it is also property in Pennsylvania, observing, in support
" of this position, that the holder of a bond of the company
" could not enforce it except in that State, and that the
" mortgage given for its security was upon property and
" franchises within her jurisdiction. The amount of all
" which is this: that the State which creates and protects a
" corporation ought to have the right to tax the loans nego-
" tiated by it, though taken and held by non-residents, a
" proposition which it is unnecessary to controvert. The
" legality of a tax of that kind would not be questioned if,
" in the charter of the company, the imposition of the tax
" were authorized, and in the bonds of the company, or its
" certificates of loan, the liability of the loan to taxation
" were stated. The tax in that case would be in the
" nature of a license tax for negotiating the loan, for in
" whatever manner made payable, it would ultimately fall
" on the company as a condition of affecting the loan, and
" parties contracting with the company would provide for
" it by proper stipulations. But there is nothing in the
" observations of the court, nor is there anything in the
" opinion, which shows that the bond of the non-resident
" was property in the State, or that the non-resident had
" any property in the State which was subject to taxation,
" within the principles laid down by the court itself, which
" we have cited."

* * * * * * *

" It is undoubtedly true, that the actual *situs* of personal
" property which has a visible and tangible existence and
" not the domicile of its owner, will, in many cases, deter-
" mine the State in which it may be taxed. The same thing
" is true of public securities consissing of State bonds and
" bonds of municipal bodies, and circulating notes of bank-
' ing institutions; the former, by general usage, have ac-
" quired the character of and are treated as property in
" the place where they are found, though removed from the

" domicile of the owner; the latter are treated and pass as " money wherever they are. But other personal property, " consisting of bonds, mortgages and debts generally, has " no *situs* independent of the domicile of the owner, and " certainly can have none where the instruments, as in the " present case, constituting the evidence of debt, are not " separated from the possession of the owners.

" Cases were cited by counsel on the argument from the " decisions of the highest courts of several States, which ac- " cord with the views we have expressed. In *Davenport* vs. " *The Mississippi and Missouri Railroad Company* (12 *Iowa*, " 539), the question arose before the Supreme Court of Iowa, " whether mortgages on property in that State, held by non- " residents, could be taxed under a law which provided that " all property, real and personal, within the State, with cer- " tain exceptions not material to the present case, should be " subject to taxation, and the court said:

" 'Both in law and equity the mortgagee has only a chat- " tel interest. It is true that the *situs* of the property mort- " gaged is within the jurisdiction of the State, but the mort- " gage itself, being personal property, a chose in action, at- " taches to the person of the owner. It is agreed by the " parties that the owners and holders of the mortgages are " non-residents of the State. If so, and the property of the " mortgage attaches to the person of the owner, it follows " that these mortgages are not property within the State, " and if not, they are not the subject of taxation.'

* * * * * * *

" We are clear that the tax cannot be sustained; that the " bonds being held by non-residents of the State are only " property in their hands, and that they are thus beyond " the jurisdiction of the taxing power of the State. Even " where the bonds are held by residents of the State, the re- " tention by the company of a portion of the stipulated in- " terest can only be sustained as a mode of collecting a tax " upon that species of property in the State. When the " property is out of the State, there can then be no tax " upon it for which the interest can be retained. The tax " laws of Pennsylvania can have no extra territorial opera- " tion."

This doctrine applies to all Governments, and is the necessary result of distinct sovereignties.

Summing up at this point the principles enunciated by this court which are applicable to the present case, they may be condensed into two affirmative propositions:

1. That the tax imposed by the 122d section was, whatever its form, in substance a tax on the stockholders and bondholders of the corporations named in the act, and not on the corporations.

2. That the taxing power of all governments is confined by inherent limitations to the persons and property within their jurisdiction.

We have grouped stock and bondholders in the first proposition, for the reason that this court has repeatedly treated them as standing on the same ground under this act. Certainly no distinction between them can be raised which would be hostile to our claim in the present case. If it should be asserted that the stock of American corporations has its *situs* in this country, and therefore its dividends may be deemed within the taxing power of the United States, no such suggestion can be tenable in regard to debts due from such corporations to non-resident aliens, for these, clearly, in the language of Mr. JUSTICE FIELD, "follow their domicile wherever that may be" (15 Wall, p. 320). If, therefore, the corporation is not liable to the Government for a tax on the dividend paid by it to a shareholder when the latter is exempt from the tax, *a fortiori*, the corporation is not liable for a tax on the interest paid to the bondholder when he is

exempt from the tax. This case is, therefore, within the doctrine laid down by this court in *Stockdale* v. *Insurance Companies*, viz.: "*That when a dividend is declared to any stockholder whose dividend is, for any special reason, exempt from such tax, as in the case of the City of Baltimore on her stock in the railroad company, then the corporation declaring the dividend is not liable.*"

The views thus far presented in this brief were sustained by the courts below in this case (as will be seen by the opinions of Judge Blatchford and Mr. Chief-Justice Waite, appended hereto), and our present argument would end here, but for the case of the *Michigan Central Railroad Co.* v. *Charles W. Slack, Collector, &c.*, decided at October Term of this court, 1879, and reported as *Railroad Company* v. *Collector* (100 U. S., 595). (The report of this case is, for convenience, appended to this brief.)

V.

The very considerable amount in controversy in the present case, reaching now nearly $70,000, will, we trust, justify us in submitting some further observations on the law which was laid down by the courts below, and which we respectfully submit should govern it here. If in these observations we seem to contend against any doctrine enunciated by this court, in the case of *Railroad Company* vs. *Collector*, we must crave the indulgence of the court in view of the great disparity in the amount involved in that case and the one under consideration.

Before passing to the main questions to be discussed under this head, several points should be borne in mind:

1. Whether the tax imposed by section 122 of the Internal Revenue Act is in form laid on the corporation, is a question of no importance, for it is, in substance, a tax on, and to be taken from the bondholder.

Stockdale v. *Insurance Co.*, 20 *Wall.*, 323.

2. If the bondholder is not liable to be taxed then the corporation which pays him the interest is exempt from payment of the tax, and therefore is not liable.

Ibid.

3. That the debt created or evidenced by the bond (including the interest of course) when held by a non-resident alien, is not the property of the debtor, nor property having its *situs* where the debtor resides. These principles, as already remarked, have all been established by this court by the cases cited. On this last point the declaration of the court was clear and emphatic:

"But debts owing by corporations, like debts owing by "individuals, are not property of the debtors in any sense; "they are obligations of the debtors, and only possess value "in the hands of the creditors. With them they are prop- "erty, and in their hands they may be taxed. To call debts "property of the debtors is simply to misuse terms. All the "property there can be, in the nature of things, in debts of "corporations, belongs to the creditors, to whom they are "payable, and *follows their domicile*, wherever that may be. "Their debts can have no locality separate from the parties "to whom they are due. This principle might be stated in "many different ways, and supported by citations from "numerous adjudications, but no number of authorities and

" no forms of expression could add anything to its obvious " truth, which is recognized upon its simple statement " (15 Wall., p. 320).

To the same effect, see WAITE, *Ch. J.* in

Tappan v. *Merchants' National Bank* (19 Wall., 499).

4. The bonds in question, according to the agreed facts, were all held by non-resident aliens, and the principal and interest were payable in London. The bonds were all issued and negotiated in London and have always remained there, or in other foreign countries, held and owned by non-resident aliens.

5. Before the interest became due the funds for its payment were necessarily sent to London, and remained there until paid out to the holders.

6. By the express terms of the act the tax was not imposed till "*such interest * * * shall be payable*," *i. e.*, when, or at the date, it shall mature and become due. In the case of dividends, the tax would attach when they were declared. In that of interest, it would attach when the coupons became due.

IN VIEW OF THE UNDENIABLE FACTS IN THE CASE IT WOULD SEEM CLEAR THAT THIS IS A SUIT, IN SUBSTANCE, TO COLLECT, THROUGH THE DEFENDANT IN ERROR, TAXES FROM NON-RESIDENT ALIENS, OUT OF PROPERTY WHICH HAD ITS *situs* AT THEIR FOREIGN DOMICILE.

It has been well remarked that " The term ' tax ' includes all contributions imposed by the Government upon individ-

uals for the service of the State. The individual and not his property pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be in default in not paying at the time stipulated by law."

Green v. *Crofts*, 28 *Miss.*, 70, 75.

"A personal tax is the burden imposed by Government "on its own citizens for the benefits which that Government "affords by its protection and its laws; and any Govern- "ment which should attempt to impose such tax on citizens "of other States would justly incur the rebuke of the en "lightened sentiment of the civilized world."

Green., Ch. J., in State vs. *Ross*, 23 *N. J. L.*, 521.

"Taxation is a sacred right, an incident of sovereignty. "The right of legislation is co-extensive with the incident "to attach it upon all *persons and property within its juris-* "*diction.*"

Dobbins vs. *Commrs. of Erie County*, 16 *Pet.*, 435, 447.

"In imposing a tax the Legislature acts upon its con- "stituents.

"All subjects over which the power of a State extends, "are objects of taxation, but those over which it does not "extend, are, upon the soundest principles, exempt from "taxation.

"This proposition may almost be pronounced self-evi- "dent."

Marshal, Ch. J., in McCulloch vs. *Maryland*, 4 *Wheat.*, 428, 429.

This, of course, is familiar doctrine, and is founded on the equally familiar rule laid down by PARKER, *Ch. J.*, in ***Blanchard*** vs. *Russell* (13 Mass., 1).

"That the laws of any country cannot, by any inherent "authority, be entitled to respect exterritorially, or beyond "the State enacting them, is the necessary result of distinct "sovereignties."

Even the British Parliament has no power, save in respect to matters of procedure, to legislate for foreigners out of the dominions of the crown.

Loper vs. *Bernstein*, 4 *Moore P. C. C.*, 300, 305.

In *Jeffries* vs. *Bovey*, Baron PARKE declared:

"It is clear that the Legislature has no power over any "persons except its own subjects, that is, persons natural "born subjects or residents, or whilst they are within the "limits of the kingdom. The Legislature can impose no "duties on them."

4 *H. L. Cases*, 815, 896.

It is no answer to such of the foregoing cases as deal with the taxing power of the States of this Union, to say that they have no application to the one now before the court, for they rest on the fundamental and universal doctrine that the municipal law of all Governments is limited to the subjects within their jurisdiction. The taxing power is no exception to this rule. Over those subject their taxing power is supreme and unlimited.

It would be superfluous, in this presence, to cite at great length the writers on international law in support of this fundamental rule, which limits the effect of the laws of a State to subjects within its jurisdiction.

Wheat. Law of Nations, Lawrence, 2d Ed., pp. 161, 162.

We therefore respectfully submit that the non-resident foreign creditors to whom the defendant in error paid the £181,000 sterling, were exempt from the tax, and that, therefore, under the rule laid down by this court in *United States* vs. *Railroad Company* and *Stockdale* vs. *Insurance Companies*, "the corporation paying the interest is not liable."

VI.

But it will, doubtless, be said, on the authority of the *Railroad Company* vs. *Collector*, that the question whether the non-resident alien was exempt, and, therefore, the defendant in error is not liable, is one which this court cannot reach, but is bound by the act of Congress in the premises.

It is conceded, of course, that there is a class of subjects upon which the courts are bound by the action of the legistive or executive departments of the Government. Numerous cases of this kind are to be found in the reports, but it is respectfully submitted that they relate to questions of foreign or interstate policy, to the territorial boundaries between the United States and foreign countries, or to the political *status* of States, or to the question whether a state of war existed at a given time, or other analogous matters on which the action of Congress or the executive is final and conclusive. To this class of cases belong

Williams vs. *The Suffolk Ins. Co.*, 13 *Pet.*, 415.
Gussher vs. *Lee*, 12 *Pet.*, 511.
Foster vs. *Neelson*, 2 *Pet.*, 253.
Kennett vs. *Chambers*, 14 *How.*, 38.
Luther vs. *Borden* 7 *How.*, 1, 43.
Georgia vs. *Stanton*, 6 *Wall.*, 50.

Others might be cited of the same purport.

But it is submitted, with all deference, that whether a civil or criminal statute enacted by the Legislature of any Government, can control the rights of citizens and residents of another State with which that Government is at peace, is a question over which the courts of the latter always have jurisdiction whenever it is presented in a suit. If the defendant in error had withheld from the foreign bondholder 5 per cent. of the interest due on these bonds, beyond doubt the foreign holders would have brought suit in the courts of this country to recover it according to the contract. These courts would have been confronted with the same question that is now presented here, viz., the right of the corporation to withhold the 5 per cent. The only defense the corporation could have presented would have been this act of Congress; to which, of course, the plaintiffs would have replied that they were non-resident foreigners, subjects and citizens of a foreign State, having their domicile within its territory, and holding the bonds and receiving their interest there, where both were payable; that, therefore, they were not liable to taxation by the United States, on the ground that the attempt of the latter to subject them or their property, under such circumstances, would obviously be in conflict with a fundamental rule of international law. We submit that this replication would be conclusive.

Cases involving a question analogous in principle have been before the English courts, and in two of them, at least, the rule was laid down that no British act of Parliament, if inconsistent with the law of nations, can affect the right of foreigners.

Le Louis, 2 *Dodson*, 209, 210.

That case involved the legality of the seizure and condemnation of a French vessel engaged in the slave trade. The seizure was made by a cutter under a colonial commission, and the condemnation was by a Vice-Admiralty Court under the Act 51 Geo. III. An appeal was taken to the High Court of Admiralty, where the decision below was reversed; Lord Stowell declaring:

"That neither this British act of Parliament, nor any commission founded on it, can affect any right or interest of foreigners, unless they are founded upon principles and impose regulations that are consistent with the law of nations. *That is the only law which Great Britain can apply to them;* and the generality of any terms employed in an act of Parliament must be narrowed in construction by a religious adherence thereto" (p. 239).

The language of the Act of 51 Geo. III. was broad enough to include the very transaction which was then before the court. Besides, the character of the slave trade was so obnoxious to the enlightened sentiment of the civilized world that nothing but the unbending rule of the law of nations, which exempts foreigners from the operation of the laws of another State, led to the reversal of the case.

If it is said that the language of 51 Geo. III. is susceptible of being construed so as to exclude foreigners from its operation, the answer is that the language of the act was broad enough to embrace them, and they were excluded from its operation by the court on the ground, that by the law of nations the British Government had no power to apply its provisions to them. That this is the view of the meaning of Lord Stowell is obvious from the manner in which the case is cited by the most approved writers on international law.

Mr. Phillimore cites his Lordship as saying :

"Neither *an* act of Parliament, nor any commission "founded on it, can affect any right or interest of foreign- "ers," &c.

Phillimore's International Law, 2d Ed., Vol. I, p. 38.

So, too, in the 2d Ed. of Lawrence's Wheaton on International Law, p. 259, note, it is said :

"Lord STOWELL decided that *no* British Act of Parlia- "ment, or any commission founded on it, if inconsistent "with the law of nations, can affect the rights or interests "of foreigners," &c.

It cannot be said that Mr. Phillimore was misled by the syllabus of the reporter, for he cites at length from the body of the opinion. The same remark applies to the extract from Lawrence's Wheaton. Besides, the reporter was of counsel in the case, and may be presumed to have understood the scope of the decision, which, though long and elaborate, was evidently delivered orally from the bench.

In *Madrazo* vs. *Willis* (3 Barn. & Ald., 353), a similar question arose. That was the seizure of a Spanish vessel with a cargo of slaves on board by a captain of the royal navy. The owner brought suit in the King's Bench, and the case was tried to the jury. A verdict went for the plaintiff—£18,180 for the supposed profit on the cargo of slaves, and £3,000 for deterioration of the ship's stores and goods.

On a motion before the full bench for a rule *nisi* to reduce the damages to £3,000, it was contended by the defend-

ant that by 47 Geo. III. the slave trade and all dealings connected with it were declared unlawful, and that, therefore, no one could recover damages in respect to a cargo of slaves. Also that by 51 Geo. III. that trade was declared to be contrary to the principles of justice, humanity and sound policy; and that, therefore, no right of recovery could exist before an English court. The motion was denied and judgment entered for the whole amount of damages found by the jury. The judges delivered opinions *seriatim*. BAYLEY, *J.*, remarked, that

"A British court of justice is always open to the subjects "of all countries in amity with us, and they are entitled to "compensation for any wrongful act done by a British sub- "ject to them. It is no answer to the present action to say "that it would not be maintainable by a British subject, for "the only questions are, whether the act of the defendant "be wrongful, and what injury the plaintiff has sustained "by it? Although the language used by the Legislature "in the statute referred to is very strong, *yet it can only ap- "ply to British subjects*, and can only render the slave trade "unlawful if carried on by them; *it cannot apply in any way "to a foreigner*. It is true, that if this were a trade contrary "to the law of nations, a foreigner could not maintain "this action. But it is not; and as a Spaniard cannot be "considered as bound by the acts of the British Legislature "prohibiting this trade, it would be unjust to deprive him "of a remedy for the wrong which he has sustained."

The opinion of BEST, *J.*, was to the same effect, that the acts of the British Legislature would not affect the rights of foreigners. He says:

"The assertion of a right to control the subjects of other "States in this respect would be inconsistent with that in- "dependence which we acknowledge that every govern- "ment possesses."

MARSHALL, C. J., in *The Appollon*, (9 Wheat. p. 370,) said: "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and compre- hensive the phrases used in our municipal laws may be, they must always be [illegible] in construction to places and persons upon whom the legislature [illegible]ority and jurisdiction."

It is respectfully submitted, that the powers of the Congress of the United States to affect by legislation the persons of non-resident foreigners, or their property, having its *situs* at their foreign domicile, are no greater (as they are no less) than the powers of the British Parliament; and that the extent and effect of the limitations of such legislation, under the rules of international law, in time of peace, is purely a judicial question over which the courts of both countries have jurisdiction. Certainly, the courts of Great Britain are armed with no greater power over such a question than those of the United States.

It is difficult, therefore, to see how, in a suit brought by the non-resident alien to recover the 5 per cent., if the corporation had withheld it, the court could properly avoid passing on the question whether or not he was exempt from the tax, for his liability or exemption would be the pivot on which the controversy between an alien and a citizen or corporation would turn. It would belong to that class of controversies which the Constitution expressly assigns to the judicial department. This question now comes up here in a suit by the United States in which they invoke the power of the court to execute this law.

It is unnecessary to remark that this Internal Revenue Act is not a retailiatory measure enacted by Congress for the purpose of redressing wrongs or enforcing rights against foreign countries or their subjects, but a purely municipal or domestic statute, having no connection with, or relation to, the administration of the foreign affairs of the government. It has, therefore, the limitation that inheres in all

domestic legislation, which, by virtue of the common consent and practice of civilized nations, confines such legislation to the persons and property within the jurisdiction of the enacting power.

If such legislation can lawfully transcend this limitation by taxing a portion of the income of non-resident subjects of other nations, it can tax *all* their income. Where a power to tax in a given case exists in kind, its exercise is unlimited in degree. If the United States has the power to tax the income of British subjects derived from bonds of the Erie Railway Company, it has the power to tax their income derived from bonds of British railways. The only difficulty would be in the collection of a tax of the latter description. If any of these subjects should happen to come within the territory of the United States, a suit could be brought by the latter in its own courts to recover such a tax. We respectfully ask, would this court say to a defendant who was resisting such a suit, that the act of Congress was conclusive upon its own power to tax the entire human race?

It is said, in behalf of the plaintiff in error, that there is no limit to the taxing power of the United States except what is found in the Federal Constitution. It is conceded, of course, that this is true in regard to all subjects over which the taxing power extends. It is conceded, too, that there is no express prohibition in the Constitution which limits the taxing power of Congress to subjects within its jurisdiction. But there are many implied limitations on every government growing out the nature of things. Mr. Justice MILLER, in delivering the opinion of this court in *Loan Association* vs. *Topeka* (20 *Wall.*, 663), well remarks:

"The theory of our Governments, State and National, "is opposed to the deposit of unlimited power anywhere. "The executive, the legislative and the judicial branches "of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of "the essential nature of all free governments, *implied* "reservations of individual rights, without which the social "compact could not exist, and which are respected by all "governments entitled to the name. No court, for instance, "would hesitate to declare void a statute which enacted "that A and B, who were husband and wife to each other, "should be so no longer, but that A should thereafter be the "husband of C, and B the wife of D, or should enact that "the homestead now owned by A should no longer be his, "but should hencetorth be the property of B."

We respectfully submit that this limitation on the taxing power of the United States, for which we contend, grows out of the essential nature of all governments, whether free or despotic; and that, therefore, this court has no power to enforce a law which transcends this limitation. The Federal Constitution does not prohibit Congress from declaring the marriages of non-resident aliens void, but this court would hardly hold itself bound by an act of Congress which in terms annulled such marriages. Nor does the Constitution prohibit Congress from enacting that any given crime, committed by foreigners in their own countries, shall be punished by the courts of this nation, if the criminals come within its territory. But no American court, we apprehend, would try an Englishman for an offense committed in London.

The remarks of the court in Loan Association *v.* Topeka, just cited, are followed by others which bear on the present case. The opinion states:

"Of all the powers conferred upon government that of "taxation is most liable to abuse. Given a purpose or ob- "ject for which taxation may be lawfully used and the ex- "tent of its exercise is in its very nature unlimited. It is "true that express limitation on the amount of tax to be "levied or the things to be taxed may be imposed by con- "stitution or statute, but in most instances for which taxes "are levied, as the support of government, the prosecution "of war, the national defense, any limitation is unsafe. The "entire resources of the people should, in some instances, "be at the disposal of the government.

"The power to tax is, therefore, the strongest, the most "pervading of all the powers of government, reaching di- "rectly or indirectly to all classes of the people. It was "said by Chief Justice Marshall, in the case of McCulloch "v. The State of Maryland, that the power to tax is the "power to destroy. A striking instance of the truth of the "proposition is seen in the fact that the existing tax of ten "per cent. imposed by the United States on the circulation "of all other banks than the National banks, drove out of "existence every State bank of circulation within a year or "two after its passage. This power can as readily be em- "ployed against one class of individuals and in favor of an- "other, so as to ruin the one class and give unlimited wealth "and prosperity to the other, if there is no implied limita- "tion of the uses for which the power may be exercised.

"To lay with one hand the power of the government on "the property of the citizen, and with the other to bestow "it upon favored individuals to aid private enterprises and "build up private fortunes, is none the less a robbery be- "cause it is done under the forms of law and is called taxa- "tion. *This is not legislation. It is a decree under legislative "forms.*"

VII.

Possibly, it may be suggested that the practice of nations in regard to confining the operation of their income tax laws to their own subjects is not uniform. We, therefore, cite

the only discussion on that particular subject which has fallen under our observation.

Phillimore, in his Treatise on International Law (2 ed., vol. 2, pp. 14, 15), says:

"In States where a general income tax has been imposed, "the tax being levied on, amongst other things, income aris- "ing out of dividends in the public funds, a nice question "arises whether this income tax should be levied on divi- "dends payable to foreigners resident out of the State; that "is, whether a State may impose a tax on the interest of "her own debt due to a foreign creditor. The practice in "England itself has been not to impose this tax, but the "English Government in India imposed a tax upon the in- "terest payable on its debt to its creditors of all nations. "Indeed, the English holder of Indian stock pays a double "duty—first to the Indian and then to the English Govern- "ment. In his recent speech on the Budget, of April 21st "last, the present Chancellor of the Exchequer is reported "to have said that dividends belonging to foreigners resid- "ing abroad, to the amount of £70,000 annually, were not "taxed, and to have added, 'I say boldly that I know of no "'proper exemption from taxes except in those cases where "'the taxes are not worth collecting. (The *Times*, April "21, 1871.)

"The several States of the United States of America de- "duct an income tax of the State from the interest on the "State debt in all cases; but the Government of the United "States levies no income tax on the Federal debt, having, in "fact, covenanted not to do so when it raised its recent "loans.

"The Austrian and Italian Governments levy heavy in- "come taxes on the interest of their funded debts, and make "no exception in the case of foreign creditors.

"It may be quite right that a person having an income "accruing from money lent to a foreign State should be "taxed by his own country on his income derived from this "source; and if his own country impose an income tax, it "is, of course, a convenience to all parties that the govern- "ment which is to receive the tax should deduct it from the

"debt which, in this instance, that government owes to the "payer of the tax, and thus avoid a double process; *but a* "*foreigner, not resident in the State, is not liable to be taxed by* "*the State;* and it seems unjust to a foreign creditor to make "use of the machinery which, on the ground of convenience, "is applied in the cases of domestic creditors, in order to "subject him to a tax to which he is not on principle "liable."

We do not perceive anything in the foregoing statement which impairs the force of the argument which we have endeavored to present. The interest on the foreign loans of a nation is payable at its own treasury. It may, therefore, be said, in one sense, to have its *situs* within the jurisdiction of the debtor country. The creditor must, in person or by agent, enter the debtor country, and receive his money there. At all events, the withholding of any portion of the interest or principal by way of "tax," or in any other form of exaction, is within the physical power, from whose action the creditor has no appeal. He can apply to no court, for no sovereign can be sued by its creditor. The latter may remonstrate, and present excellent reasons why he should not be subject to the exaction, but he will always be in the condition of those divines who consented, upon the invitation of James I., to debate theological and ecclesiastical questions with his majesty. Being worsted in his forensic efforts, that royal theologian quietly remarked, "I cannot convince them, but I can *hang* them; that's all."

With regard to the practice stated by Mr. Phillimore, it may be observed:

1. That it is confined to one subordinate or colonial government, and two independent States.

2. That it is confined to a tax on the interest of their own loans.

3. One who invests in a public loan of a government, never relies on any law to enforce its repayment, principal or interest. He trusts solely to the honor and good faith of the government whose obligation he takes. As Lord MANSFIELD remarks, in *Macheath* v. *Haldimand* (1 *Term R.*, 172): "Whoever advances money for the public service "trusts the faith of Parliament." On the contrary, every one who enters into a contract with a private person who is a foreigner, relies on the courts of the country of which the latter is a citizen to enforce the contract, at all times, except when a state of actual or qualified hostility exists between the two nations of which the contracting parties are severally citizens or residents. It is not too much to say that the reciprocal business and commerce of the civilized world rest on this principle.

4. No government (unless it be our own) has ever undertaken to tax the income of subjects of another nation accruing to them at their own domicile, upon property held there, and arising out of ordinary business, or contracts between individuals.

VIII.

The plaintiff in error, on the first argument of this case in this court, relied on the case of Railroad Company *v.* Collector, and on that alone. And, it is true, that the opin-

ion in that case says: "The tax, in our opinion, is essentially "an excise on the business of the class of corporations men- "tioned in the statute." Also, that "the tax was not laid on "the bondholder who received the interest, but on the earn- "ings of the corporation which paid the interest."

It is equally true that that case was not treated as one of magnitude, nor the disposition of it important as a future rule of action. The opening language of the opinion is: "As the sum in this suit is small, and the law under "which the tax in question has long since been repealed, the "case is of little consequence as regards any principle in- "volved in it as a future rule of action."

If now it is to stand as a bar to our defense in this action, it, in effect, overrules repeated and solemn adjudications of this court made upon full argument, and after mature deliberation, which *were treated* by the court as cases of *much consequence* as regards "*the principle involved in them as a future rule of action.*"

In this condition of the authorities it is perhaps unnecessary to state again the argument as to the construction of the statute, which these repeated adjudications established as the true one.

The conclusion so often reached and affirmed by this court, that the duty or tax to be collected from railroad companies on the amount of the interest paid on their bonded debt is a tax on the bondholder, and not a tax on the profits or earnings of the company, rests upon a comparison of section 122, under which it is exacted, and the entire portions of the same statute relating to the same subject mat-

ter, sections 116 to 123, inclusive (Act of 1864, 13 Statutes, 281-285, as amended by Act of 1866, 14 Statutes, 477-480).

The argument is, that by the natural force of the language used, these sections of the statute all obviously relate to a single subject, namely, the levying and collecting of a duty or tax on incomes of persons; that the provisions of section 122 are merely a mode provided in certain cases, and as respects a particular part of the income of individuals, for the collection of such part of the income through the agency of the corporations named, instead of directly through their own sworn returns thereof, and assessments made under the same, as in case of the rest of their income; that this intent appears upon the fair reading of section 122 itself, and also upon the comparison of that section with the rest of the statute; that this intent clearly appears in section 117, which provides for the mode of estimating the income to be taxed, and which refers to and directs the deduction from the person's gross income of any interest or dividends on which, by section 122, the corporation has been assessed and paid the tax.

The argument is so familiar to this court that counsel would hardly be justified in further enlargement upon it.

One further suggestion may, however, be made with reference to one of the reasons alleged in support of the contrary view that this tax is virtually a tax on the earnings or profits of the corporation, and not on the interest paid to the bondholder. It is suggested that the interest on the bonded debt of a railroad company, conjointly with its dividends declared, funds used for construction and funds carried to reserve account, is the measure of the annual earn-

ings of the company (by Miller, J., *Railroad Co.* v. *Collector* 100 *U. S.*, 598). With great respect it is submitted that neither in theory nor in practice can the interest accruing on the bonded debt of a corporation, any more than the interest paid on the indebtedness of an individual, be deemed to be a measure, either by itself or conjointly with other items of outlay or profit, of the earnings or profits of the corporation during the period within which such interest accrued. The common experience of corporate management and history demonstrates that this is not so. It is beyond the power of Congress to make it so by the most solemn declaration, and the construction of a statute which imputes to Congress an intention to make such a declaration is manifestly unsound, if the statute admits of any other reasonable construction.

Interest on the debt may or may not be paid out of actual earnings during the period when it accrued. Even "well conducted corporations" may and often do pay their interest for years in which they made no profits whatever.

And in this connection it may be added that, as regards *interest on debts*, it cannot be suggested, as possibly it might be in respect to dividends declared, or the stockholder's share of earnings carried to reserve account, that the bondholder, although a non-resident alien, has carried on business within the United States, under the protection of its laws, in such a sense as to make his portion of the profits accruing in such business a proper subject of taxation. Such an argument would obviously be misapplied to interest paid to a creditor of the corporation, which is not,

in any sense, the property of a person directly or indirectly carrying on the business done by the corporation, nor in any proper sense the earnings or profits accruing to him in carrying on that business.

IX.

On the question whether the court below erred in allowing judgment for the plaintiff for but one penalty, it is submitted that the decision was in harmony with the settled rule of law in analgoous cases. A prior decision of Judge Blatchford to the same effect (The *U. S.* vs. *The New York Guaranty and Indemnity Company, Dec.* 16, 1875) is appended to this brief.

Statutes imposing penalties are strictly construed.

Ferrett *vs.* Atwell, 1 *Blatch.*, 151.

Sturges *vs.* Spofford, 45 *N. Y.*, 446, 453.

The courts of this country and England have always been averse to allowing a recovery for aggregated or cumulative penalties, and have never done so unless absolutely required by statute.

For example: In Connecticut, under a statute which prescribed a penalty of a given sum against executors for every month during which they delayed to prove the will, it has been uniformly held that an action could not be sustained for more than one penalty, although there had been a delay for several months.

Barber *vs.* Eno, 2 *Root*, 150.

Ross *vs.* Baker, *Id.*, 151.

So, where a penalty of twenty dollars for each month during which an administrator or executor should neglect to file an inventory was given by statute, it has been always held, that but one penalty was recoverable for all defaults prior to bringing the suit.

So, under the act of New York, with reference to pilots, passed June 28, 1853 (*Laws of N. Y.*, 1853, chap. 477, page 921, as amended by chap. 243, *Laws of N. Y. of* 1857, vol. 1, page 500, sec. 29), it was held by the Court of Appeals, in Sturgis *vs.* Spofford (45 *N. Y.*, pp. 446, 453), that successive or aggregated penalties could not be recovered. The language of the statute applicable to this point is as follows:

"§ 29. * * * Any person not holding a license as "pilot under this act, or under the laws of the State of New "Jersey, who shall pilot, or offer to pilot, any ship or vessel "to or from the port of New York, by the way of Sandy "Hook, except such as are exempted by virtue of this act, "or any master or person on board a steamtug or towboat "who shall tow such vessel or vessels without such licensed "pilot on board such vessel or vessels, shall be deemed "guilty of a misdemeanor, and on conviction shall be pun-"ished by a fine not exceeding one hundred dollars, or im-"prisonment not exceeding sixty days; and all persons em-"ploying a person to act as pilot, not holding a license un-"der this act, or under the laws of the State of New Jersey, "shall forfeit and pay to the Board of Commissioners of "Pilots the sum of one hundred dollars."

The latter part of the section, leveled at persons employing the pilot, clearly referred to the first part of the same section which refers to the pilots or persons employed—"who shall pilot or offer to pilot *any* ship or vessel." In disposing of the question, the court, by CHURCH, *C. J.*, unanimously say (p. 453):

" The act is general in its terms. It is the employment " of an unlicensed pilot, for which the penalty of $100 is in- " curred. It does not say for each employment, nor for " each offense, nor for each ship unlawfully piloted. Penal " statutes are to be construed strictly, and the language " will justify the construction, that but a single penalty is " incurred for all of the alleged unlawful acts of the party " prior to the commencement of the action.

" All persons employing are liable, whether the unlicensed " person employed piloted one or fifty ships. It is still but " an employment (*Washburn* vs. *McInroy*, 7 *F. R.*, 134; *Tiffany* " vs. *Driggs*, 13 *F. R.*, 252). Prosecutions for aggregated " penalties should not be encouraged. Penalties are often " incurred inadvertently, or under a claim of right, and if " the prosecution is promptly instituted for a single offense, " it operates as a salutary warning to discontinue the prac- " tice or acts complained of, while delay may be regarded " as an acquiescence in the right of the party to perform the " acts. The employment of McGinn as a pilot was claimed " to be justifiable under the United States statute, and the " alleged invalidity of the State act, and involved serious " legal questions.

" The plaintiffs delayed prosecution for two years, and " then recovered nearly five thousand ($5,000) dollars, while " an action for a single penalty would have been just as " potent to settle the legal questions involved. It is a whole- " some rule not to allow a recovery for aggregated penal- " ties, unless the language of the statute clearly requires it. " Under this rule the party prosecuted will have an oppor- " tunity to desist from doing the act complained of, and if " he does not, he will knowingly incur all the hazards of re- " peated prosecutions. The judgment is affirmed for $100, " the amount of one penalty, and reversed as to the residue, " without costs to either party in this court.

" Affirmed for $100, reversed as to the residue."

It will be observed that, in the present case, the penalty is imposed, as Judge BLATCHFORD pertinently remarks, not for *each* and *every* default, but for *any* default. The lan-

guage of the court in *Sturges* vs. *Spofford*, already cited, is apt, and indicates the true construction of this statute. The general rule of strict construction naturally and fairly limits the liability to one penalty for all omissions which occurred before suit brought.

To the same general purport is the English case, *Garret* vs. *Messenger*, 10 *Cox*, 498.

In that case, SMITH, *J.*: "If it were intended to give a succession of penalties, we should have found words to that effect."

X.

We therefore submit that there is no error in the record, and that the judgment below should be affirmed.

WM. D. SHIPMAN,
Of Counsel for Defendant in Error.

U. S. DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES
vs.
THE NEW YORK GUARANTY AND INDEMNITY COMPANY.

Dec. 16, 1875.

BLATCHFORD, *J.*: I am of opinion that the provisions of section 110, respecting penalties for neglect to make return and payment of tax as to amount of deposits and capital, require only a single return to be made covering deposits and capital, and impose only one penalty of $200 for all neglects and defaults prior to the commencement of the suit. The penalty is not imposed for *each and every* refusal or neglect, but for *any* refusal or neglect. Nor is the case varied by the fact that the tax is required to be paid *each* month upon deposits, and each month upon capital, and that the return of deposits and capital is required to be made *monthly*.

So, also, under section 120, respecting penalties for neglect to make returns as to dividends, only one penalty of $1,000 is imposed for all defaults prior to the commencement of the suit.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES

vs.

THE ERIE RAILWAY COMPANY.

BLATCHFORD, *J.*: This is a suit brought by the United States against the Erie Railway Company to recover taxes alleged to be due to the plaintiffs on certain interest coupons paid by the defendant on bonds issued by the defendant, which payments were made in the years 1866, 1867, 1868 and 1869, and also to recover certain penalties alleged to be due to the plaintiffs for the failure of the defendant to make returns of the amount of said taxes. The suit is founded on section 122 of the Act of June 30, 1864 (13 U. S. Statutes at Large, 284), as amended by section 9 of the Act of July 13, 1866 (14 *Id.*, 138). Such section, as so amended, reads as follows (the parts of the section as amended, which are not found in the original section, being put in brackets, and the parts of the original section which are not found in the amended section being put in italics): "Any railroad, canal, turnpike, canal navigation or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that

may have declared any dividend, in scrip or money due or payable to its stockholders [including non-residents, whether citizens or aliens], as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty [tax] of five per centum on the amount of all such interest or coupons, dividends or profits, whenever [and wherever] the same shall be payable [and to whatsoever party or persons the same may be payable, including non-residents, whether citizens or aliens], and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons, any dividends, due and payable as aforesaid, the duty [tax] of five per centum; and the payment of the amount of said duty [tax] so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidence of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or return shall be transmitted, and the duty paid to the Commissioner of Internal Revenue within thirty days after the time when [on or before the tenth day of the month following that in which] said interest, coupons or dividends became due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of the duty [tax], and there shall be annexed thereto a declaration of the president or treasurer of the company,

under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said duty [tax]. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the duty [tax] as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or the payment of the duty [tax], or any part thereof, as aforesaid, the assessment and collection of the duty [tax] and penalty shall be made according to the provisions of law in other cases of neglect or refusal. [Provided, that whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall, in fact, fail to pay such interest, in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness.]"

Prior to September 1, 1866, the defendant had issued and sold, as hereinafter stated, sterling coupon bonds, dated September 1, 1865, the principal of which was payable ten years after date, and the principal and interest of which were, by the terms of said bonds and coupons, payable in London, England, at the office of J. S. Morgan & Co., bankers, of said London, to the amount of £800,000 sterling. After the 1st of March, 1868, and before the 1st of September, 1868, the defendant issued and sold, of the same class of bonds, £200,000 sterling, the principal and interest of which were payable at the same place as the principal and interest of the £800,000 above stated. The rate of interest on all of said bonds was *six per cent. per annum*, pay-

able semi-annually, on the first days of March and September of each year. Said bonds, with the coupons thereto attached, were all sold directly to foreign bankers, who had their banking houses and principal places of business in said London, and were resold by them to their customers in Europe. During all of the years 1866, 1867, 1868 and 1869, all of said bonds and coupons were held and owned by non-resident aliens, and not by citizens of the United States, except bonds to the amount of £20,000, and the coupons thereto belonging, which latter bonds, and no more, were held and owned by a citizen or citizens of the United States residing in Europe. The amount of the interest, as the same fell due, on all of the said bonds, was provided for and sent forward by the defendant, in one sum, to said J. S. Morgan & Co., before the dates at which the same fell due, and it was paid at the respective dates at which it fell due by said J. S. Morgan & Co., at their banking house in London, to the holders of said bonds and coupons. The total amount of interest so paid, from and including September 1, 1866, to and including September 1, 1869, was £186,000 sterling, the amount of the tax on which, at the rate of 5 *per cent.*, would be £9,300 sterling. Included therein is the amount of interest paid on the £20,000 sterling of bonds held and owned by a citizen or citizens of the United States, and the amount of taxes thereon, such interest being £4,200, and such tax being £210 sterling. The defendant made no returns to the assessor, or to any other officer of the Internal Revenue of the United States, of the payment of the said interest or of any part thereof, nor did the defendant pay any tax to the United States on said interest or any part thereof, nor did the defendant withhold said

tax, or any part thereof, from the amount of said interest, but the defendant paid the full amount of said interest to the holders of said bonds. No assessment was ever made on the defendant for any portion of said tax, nor was any demand ever made on the defendant for the payment of the same to the United States until December 31, 1872. The defendant has not paid to the plaintiffs any penalty for failure to make return of the payment of said interest.

The foregoing facts are agreed upon by the parties, in writing, and the case has been tried by the court, without a jury. The main question in the case is, whether the defendant is liable to pay to the United States the 5 per cent. tax, being £9,090 sterling on the £181,800 sterling of interest which it paid to non-resident aliens.

Under the decisions of the Supreme Court in *United States* vs. *Railroad Co.* (17 Wallace, 322), and *Stockdale* vs. *Insurance Companies* (20 *Id.*, 323), it must be regarded as settled, in the construction of the statute in question, that when interest is payable by a corporation to any bondholder who, for any special reason, is exempt from the tax on such interest, then the corporation is not liable to pay such tax. The tax is held to be a tax on the bondholder in effect and in substance, the corporation being the agent of the government for collecting and paying over the tax. It is really a tax on the income of the bondholder, and is a part of the income tax provided for by sections 116 to 123 of the Act of 1864, and the amendments thereto. In *United States* vs. *Railroad Co.* (above cited), it was held that the tax imposed by the statute in question could not be collected by the United States from a railroad corporation, in respect of interest payable by it on bonds issued by it and owned by the

City of Baltimore, on the ground that that city, being a municipal corporation, was a portion of the sovereign power of the State of Maryland, and was not subject to taxation by Congress upon its municipal revenues. The tax was not regarded as a tax on the corporation, as such, or on its revenues, but was held to be a tax on the creditor of the corporation, and the corporation was held not to be liable to the tax unless the creditor was liable. The same case also determines that, although the language of the statute in question may be broad enough to include, in terms, a tax on interest payable to a party or person not subject to taxation by Congress, yet it will not be construed as applicable to such a party or person. This view is affirmed in *Stockdale* vs. *Insurance Companies* (above cited).

Are the non-residents alien holders of the bonds in question in this case subject to taxation in respect of the interest payable and paid on their bonds? In *Railroad Co.* vs. *Jackson* (7 Wallace, 262), it was held, under the Act of 1864, before the amendment of 1866, that Congress did not intend to impose the 5 per cent. tax as an income tax on non-resident aliens; and that the scheme of the statute, in authorizing the company to deduct from the interest payable the amount of the tax thereon, was merely a mode of collecting that part of the income tax. But it is apparent that Congress, in the amendment of 1866, intended to have the tax extended to interest payable to non-resident aliens. In doing so, it has undertaken to lay a tax, and an income tax, on non-resident aliens, in respect of such interest. Can it lawfully do so?

In the case of *The State Tax on Foreign-Held Bonds* (15 Wallace, 300), the State of Pennsylvania had passed an act

requiring every company incorporated by Pennsylvania, doing business therein, which pays interest to its bondholders, to retain from said bondholders, before paying such interest, a tax of 5 *per cent.* on every dollar of interest so paid, and to pay the same to the State Treasurer for the use of the State. The State Court sustained the validity of the tax. The Supreme Court held, that bonds of corporations owned by non-residents of the State, were not property any where but in the hands of their owners; that they were thus beyond the jurisdiction of the taxing power of the State, and that the law which required the corporation to retain 5 *per cent.* of the interest due to the non-resident bondholder was not a legitimate exercise of the taxing power, because it was a tax on property beyond the jurisdiction of the State. The tax laid in that case was quite as much a tax on the corporation, or on moneys in the hands of the corporation, as is the tax now under consideration. But the Supreme Court looked through the form to the substance, and held that the tax was not a tax on the corporation, or on the property of the corporation, or on property within the jurisdiction of the State, or on the moneys in the hands of the corporations, but was a tax on the debt, which was not property of the debtor, but was property in the hands of the bondholders. The Congress of the United States can have no greater power to tax persons or property not within the jurisdiction of the United States, than a State has to tax persons and property not within its jurisdiction. By the tax in question, it has taxed either the non-resident alien, or his property, out of the jurisdiction of the United States. Probably the view which led to the amendment of 1866, was, that the tax was a tax

on the corporation, or on the earnings, profits, income or gains of the corporation, or on money in the hands of the corporation, belonging to it. The form of the enactment is, that the company shall be subject to and pay the tax on the amount of the interest it has contracted to pay, when such interest shall be payable, and, of course, before such interest shall be paid. But as the tax in this case is really a tax on the property and income of the non-resident aliens, when such property is not within the jurisdiction of the United States, and is thus a tax on the non-resident aliens themselves, it is a tax which cannot be upheld.

In arriving at this conclusion I dissent from the reasoning and decision of the Circuit Court of the District of Massachusetts, held by Judge Clark, in the case of The Michigan Central Railroad Company *v.* Slack (22 *Int. Rev. Record*, 337). In that case the court, while holding that taxation cannot extend beyond the jurisdiction of the taxing power, and that the objects of taxation must be within the territorial limits of the taxing power, arrived at the conclusion that, under the statute in question, the interest, when it became due or payable, was either the property of the corporation, and thus rightfully taxable, or the property of the bondholder, and thus taxable, because in the shape of funds within the jurisdiction of the taxing power and under its control, the tax attaching to the interest as funds of the bondholder in the hands of the corporation. These views seem to me to run counter to the decisions of the Supreme Court in *United States* v. *Railroad Company* and *Stockdale* v. *Insurance Companies* (above cited). The latter case is not referred to by Judge Clark in his opinion.

The plaintiffs are therefore not entitled to recover the tax

on the £181,800 sterling of interest which it paid to non-resident aliens, or any penalty thereon. Their right to recover the £210 sterling tax on the £4,200 sterling of interest is submitted. The defendant contends that this amount is to be recovered at its value in legal tender currency at the date of the trial or judgment. But I am of opinion that under sections 3 and 4 of the Act of March 10, 1866 (14 *U. S. Stat. at Large*, 5), as amended by section 9 *bis* of the Act of July 13, 1866 (*Id.*, 147; now section 3,178 of the Revised Statutes), that plaintiffs are entitled to recover the tax at its value in legal tender currency at the several dates when the interest was payable.

In accordance with the decision of this court in the case of the United States *vs.* The New York Guaranty and Indemnity Co. (December 16, 1875), only one penalty is recoverable for all defaults prior to the commencement of the suit.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES
vs.
THE ERIE RAILWAY COMPANY.

WAITE, *Ch. J.*—I fully concur with the learned District Judge in the view he has taken of this case. The tax, for the recovery of which the suit was brought, was the tax

upon the owner of the bond, and not upon the defendant. It was not a tax in the nature of a tax *in rem* upon the bond itself, but upon the income of the owner of the bond, derived from that particular piece of property. The foreign owner of these bonds was not in any respect subject to the jurisdiction of the United States, neither was this portion of his income. His debtor was, and so was the money of his debtor, but the money of his debtor did not become a part of his income until it was paid to him, and in this case the payment outside of the United States, in accordance with the obligations of the contract which he held.

The power of the United States to tax is limited to persons, property and business within their jurisdiction as much as that of a State is limited to the same subjects within its jurisdiction (State tax on Foreign Held Bonds, 15 Wall., 300).

The default of the defendant in making its returns was a continuing one, only one penalty, therefore, is recoverable.

The judgment of the District Court is affirmed.

100 U. S. Rep., 595 (Oct. T., 1879).

RAILROAD COMPANY v. COLLECTOR.

1. *The tax on interest paid by corporations under section* 122 *of the Internal Revenue Law, as amended by the Act of July* 13, 1866 (14 *Stat.*, 138), *is an excise tax on their business, to be paid by them out of their earnings, income and profits.*

2. *In order that its payment might be secured this tax was laid on the objects to which these earnings were applied in the usual course of business of such corporations; namely, divi-*

dends, interest on funded debt, construction or some reserve fund held by the company.

3. *Such a tax is not invalidated by the provision, that the amount of it may be withheld from the dividend, or the interest due or payable to the stockholder or the bondholder, who is a citizen or a subject of a foreign government, with no residence in this country.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

This is a suit by the Michigan Central Railroad Company against Charles W. Slack, Collector of Internal Revenue for the Third Collection District of Massachusetts, to recover a tax or duty of $860.33, paid to him under protest, on the 28th day of February, 1870, which tax was assessed on or about the 19th of that month on Sterling Bond interest paid by said company, in London, in gold, in the previous month of January, by cashing certain coupons which then fell due.

The coupons were attached to certain Sterling Bonds issued by said company to the amount of £95,700, and negotiated by their agents in London in 1852, or early in 1853. The bonds were due in July, 1872, and paid at maturity, in gold, in London.

So far as the company know, not one of them was ever held by any person in the United States, or by other than non-resident aliens, and the interest accruing was regularly paid in gold in full in London, without rebate or reservation of the United States Internal Revenue Tax.

Appeal was duly made to the Commissioner of Internal Revenue before this suit was brought.

The court below found for the defendant, whereupon the company brought the case here, and assigns for error that the court below erred in finding that Congress had power to impose the tax in controversy, and that, upon the facts, judgment must be for the defendant.

Mr. FRANCIS W. PALFREY for the plaintiff in error.

It is a conceded proposition, that the United States has not the power to tax non-resident aliens directly. As persons they are not liable to our taxation. But it is alleged that their property was within our jurisdiction, and therefore taxable.

The reply to this proposition is:

1. That it is settled law in this court that the Internal Revenue taxation on coupon interest is a tax on income, and so a tax on persons.

2. That the money set apart by the railroad company to pay the coupon interest due to its non-resident alien bondholders was not taxable property within the jurisdiction of the United States.

In support of the first proposition it can hardly be necessary to do more than to cite *Haight* v. *Railroad Company*, 6 Wall., 15; *Railroad Company* v. *Jackson*, 7 id., 262, 269; *Barnes* v. *The Railroads*, 17 id., 294; *United States* v. *Railroad Company*, id., 322; *Stockdale* v. *Insurance Companies*, 20 id., 323, 330, 337; *Railroad Company* v. *Rose*, 95 U. S., 78.

And in support of the second: *State Tax on Foreign-held Bonds*, 15 Wall., 300, 324, 325; *Murray* v. *Charleston*, 96 U. S., 432; *Caruthers* v. *Humphrey*, 12 Mich., 270; *Van Husen* v. *Kanouse*, 13 id., 303; *Union Bank* v. *The State*, 9 Yerg

(Tenn.), 490 ; *Oliver* v. *Washington Mills*, 11 Allen (Mass.), 268, 273.

The Solicitor-General, contra.

Mr. JUSTICE MILLER delivered the opinion of the court.

As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action.

The tax was assessed under section 122 of the Internal Revenue Law, as amended by the Act of 1866.

What is pertinent to this case reads as follows :

" Any railroad, canal, turnpike, canal navigation or slack-
" water company, indebted for any money for which bonds
" or other evidence of indebtedness have been issued, pay-
" able in one or more years after date, upon which interest
" is stipulated to be paid, or coupons representing the in-
" terest, or any such company that may have declared any
" dividend in scrip, or money due or payable to its stock-
" holders, including non-residents, whether citizens or aliens,
" as part of the earnings, profits, income or gains, of such
" company, and all profits of such company carried to the
" account of any fund, or used for construction, shall be
" subject to and pay a tax of five per centum on the amount
" of all such interest or coupons, dividends or profits, when-
" ever and wherever the same shall be payable, and to what-
" soever party or person the same may be payable, includ-
" ing non-residents, whether citizens or aliens; and said
" companies are hereby authorized to deduct and withhold
" from all payments on account of any interest or coupons
" and dividends due and payable, as aforesaid, the tax of
" five per centum, and the payment of the amount of said
" tax so deducted from the interest or coupons or dividends,
" and certified by the president or treasurer of said com-
" pany, shall discharge said company from that amount of
" evidences of their indebtedness so held by any person or

" the dividend or interest, or coupon on the bonds, or other " party whatever, except where said companies have con- " tracted otherwise." 14 Stat., 138.

The agreed statement on which the case was tried shows that the tax was for interest paid by the company on Sterling bonds in London, which bonds were issued long before the internal revenue law was enacted, and it is perhaps fairly to be inferred from the statement that the bonds were held at the time by foreigners.

It is on this latter feature of the case that resistance to the tax is founded. It is urged that it is a tax on the property, if property it may be called, of persons not subject to the jurisdiction of this government, and therefore beyond the power of Congress to levy or enforce.

That the tax was actually collected without resistance, and the present suit is brought to recover it back, is sufficient answer to the assertion that it could not be enforced.

Whether Congress, having the power to enforce the law, has the authority to levy such a tax on the interest due by a citizen of the United States to one who is not domiciled within our limits, and who owes the Government no allegiance, is a question which we do not think necessary to the decision of this case.

The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. The section is a part of the system of taxing incomes, earnings and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely. The corporations mentioned in this section are those engaged in furnishing road-ways and water-ways for the transportation of persons and property, and the mani-

fest purpose of the law was to levy the tax on the net earnings of such companies. How were these "earnings, profits, incomes or gains" to be most certainly ascertained? In every well conducted corporation of this character these profits were disposed of in one of four methods, namely, distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in its hands. Looking at these modes of distribution as the surest evidence of the earnings which Congress intended to tax, and as less liable to evasion than any other, the tax is imposed upon all of them. The books and records of the company are thus made evidence of the profits they have made, and the corporation itself is made responsible for the payment of the tax.

Manifestly, such a mode of ascertaining the net earnings of the company would not be complete unless the sums paid as interest on their bonded debts were taken into the account.

Of course, it was competent for Congress to tax only the earnings after *deducting* this interest paid on their debt, or to treat the sum so paid as part of the net earnings, and paid out of them as dividends were. It adopted the latter policy.

It results from this course of observation that the tax was not laid on the bondholder who received the interest, but on the earnings of the corporation which paid the interest.

It is very true that the act went further, and declared that, except when the company had contracted otherwise, it might deduct this tax from the amount due the bondhold

ers; and when the bondholder was subject to Congressional legislation by reason of citizenship, residence or *situs* of the property taxed, it was within the lawful power of Congress to do so. Whether, as a question of international law, this declaration would relieve the corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss, for this court, on all such subjects, is bound by the legislative and political departments of its own government. The tax is laid by Congress on the net earnings, which are the results of the business of the corporation, on which Congress had clearly a right to lay it, and being lawfully assessed and paid, it cannot be recovered back by reason of any inefficiency or ethical objection to the remedy over against the bondholder.

Judgment affirmed.

FILED
OCT 6 1892
J. H. McKENNEY, Clerk

SUPREME COURT of the UNITED STATES.

No. 11.

THE UNITED STATES, PLAINTIFF IN ERROR

vs.

THE ERIE RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR DEFENDANT ON REARGUMENT.

WM. D. SHIPMAN,
Of Counsel for Defendant.

Supreme Court of the United States.

No. 11 .

THE UNITED STATES, *Plaintiff in Error,* *vs.* THE ERIE RAILWAY COMPANY.	*In Error to the Circuit Court of the United States, for the Southern District of New York.*

REARGUMENT.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

I have but few observations to submit in addition to those on my principal brief.

I.

In construing the Act of July 13, 1866, of which the section 122 forms a part, it is pertinent to consider the circumstances under which it was enacted by Congress. The bill originated in the House, and after being considered and

passed by that branch it came to the Senate. It was intended to be a complete measure, covering the whole subject matter of internal taxation. In the Senate, especially, it was subject to severe scrutiny. In that body it was in charge of Mr. Fessenden, and was read and amended section by section. It was under consideration there for five days, and in the effort to perfect its provisions, the best lawyers in the Senate participated. That body made to the bill as it came from the House, more than six hundred and fifty amendments, nearly all of which were acceded to by the House on the report of a Committee of Conference. All this was done after the cases of *Haight* v. *The Railroad Company* (6 *Wall.*, 15), and *Railroad Company* v. *Jackson* (7 *Wall.*, 262), had been decided by the courts below; the former by the United States Circuit Court, for the Western District of Pennsylvania, and the latter by the same court for the District of Maryland. In both cases it had been held that tax, or "duty," as it was then termed, was a tax on the individual bond or stockholder, and not on the corporation, the latter being the mere instrument of the Government for the collection of the tax. In the case of the *Railroad Company* v. *Jackson*, the court had also held that the act did not include non-resident aliens. With all these decisions in view, Congress proceeded to revise and amend the law.

But no change whatever was made transferring the tax or duty from the bondholder, or stockholder, to the corporation. That the income of the former and not the business of the latter, was the subject taxed, had been judicially determined by the Federal Courts, a determination subse-

quently and repeatedly affirmed by this court. The only change made having any possible relation to this question was in the direction of removing all doubt of the correctness of the decisions of the Circuit Courts as to the subjects intended to be taxed, by striking out the word "duty," a term appropriate to designate an excise on business, and inserting the word "tax," a term especially apt to designate an exaction from the specific property of individuals.

But Congress did enlarge, or attempted to enlarge the number of persons to whom the tax should apply by adding the words, "including non-residents whether citizens or aliens."

It is clear from this that Congress, when it amended the Act of June 30, 1864, by the Act of July 13, 1866, intended that the tax should remain on the income of the bondholder and stockholder, where the courts had declared that the prior law had placed it.

That I am not merely speculating on doubtful probabilities, I call the attention of the court to the fact that the attention of the Senate was directed to the particular section in question; and that the fact that its effect was to levy a tax on the bondholder and not to impose a mere excise on the business of the corporation, was perfectly understood. The body of the section made the tax due and payable by the company to the Government, as soon as the interest became due and payable to the bondholder. Left thus, the result would be that the company would be compelled to pay taxes on its interest as fast as it matured, whether it was able to pay that interest to its creditors or not. It is true that when it resumed the payment of its interest, it

was authorized to deduct the amount of taxes paid thereon from its debtor. But, in the meantime, it might be seriously embarrassed, unable to meet even its current running expenses, and still more unable to meet its creditor's taxes. Mr. Hendricks, after reading a part of section 122, called the attention of the Senate to this hardship, and the following discussion took place:

"MR. HENDRICKS: This construction has been given to "that provision (section 122), that as soon as the coupons "became due, the company shall pay five per cent. on them, "whether the company is in condition to pay the coupons "or not; in other words, it is so construed as to make the "payment of the tax to be upon the indebtedness of the "company. *This was intended to be an income tax; that the "five per cent. should be paid by the company instead of the party "to whom the interest is payable.* The proposition I now make "is, that it shall be, in fact, an income tax; that it shall be a "tax *upon the interest paid to the bondholder, instead of being "a tax against the company upon its indebtedness.* Con-"gress did not intend to tax the indebtedness of a corporation, "*but intended to tax the income of the bondholders* against the "company, and provided that a tax should be paid directly "by the company to the Government *instead of collecting the "tax from the bondholder after the coupon or interest had been "paid.* It seems to me this is right. There is one company "in the State of Indiana that has not been able to pay its "coupons, but it has been required to pay the tax upon the "coupons when it was not able to meet them. My propo-"sition is, that when a company pays the coupons, and not "before, it shall pay the five per cent. tax upon them into "the Treasury."

"MR. SHERMAN: The substance of this amendment I had "intended to offer myself. The tax, as it is now imposed, "is really a tax upon an insolvent corporation. *This is a "mode of collecting the income tax levied upon persons who own "stock in incorporate companies, or are bondholders of those*

"*companies*. I think there ought to be some provision to "meet the case stated by the Senator from Indiana. There "are many corporations in the Western States, and perhaps "some in the other portions of the country, that are labor- "ing under the difficulty which that Senator has stated.

"This was really intended to be an income tax of five "per cent. levied upon coupons or interest paid by corpo- "rations. In some cases the corporations themselves are "insolvent, and cannot and do not pay their interest to the "bondholders. The tax, however, is notwithstanding levied "upon the corporations, and it is collected from their other "property, adding to their insolvency, and in some cases "really taking away from them the power to go on. *The* "*section was intended to provide for an income tax, and for* "*convenience of collection*, levied it on the company rather "than on the bondholder. The effect of the section, as "practically construed, however, is to add to the insolvency "of an insolvent corporation, and take away from them the "means of paying their liabilities. I think, therefore, some "such provision as this ought to be inserted. I commenced "to draw one, but I have not yet completed it. I had "thought of putting it in the shape of a proviso, providing "that whenever any of the companies named, by reason of "their inability to pay their interest, should, in fact, fail to "pay it, the tax should be postponed until they did pay it."

The proviso added to section 122 was then agreed to as enacted.

Congressional Globe, Part 4, 1st Session, 39th Congress, pp. 3370, 3371.

II.

If, as stated in the opinion of this court in Railroad Company *vs.* Collector (100 U. S., 545), "The tax * * * is essentially an excise on the business of the class of corpo-

rations mentioned in the statute," what necessity or propriety was there for amending the Act of 1864, by extending its provisions to non-resident aliens? If Congress intended to tax the business, income, or profits of the corporation as measured by the amounts paid in dividends to its stockholders, or paid as interest to its creditors, it was of no consequence who their stockholders or creditors were. If the corporation was taxed on its business, its creditors were not, and their residence or nationality was not of the slightest moment. If the company merely was taxed, the the tax would have been laid simply on all dividends declared, and all interest due and payable.

And the proviso adopted, on motion of Mr. Hendricks, rivets the construction for which I am contending—

"*Provided*, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay the same, that in such cases, the tax levied by this section shall not be paid to the United States until said companies resume the payment of interest on their indebtedness."

Here it is clear, that, if the company was able to pay its interest, and the latter had matured, it was to pay the tax, no matter how it had obtained the money, whether from its earnings, gains, or profits, *or by borrowing it*. If it had the money, and was therefore able to pay, and its creditor was entitled to it, it must pay the income tax. Borrowed money is not income of the borrower, but it is income of the creditor whenever it is used in the payment of interest to the latter. It is notorious that railroad companies, as well as others, aften are compelled to borrow money to meet their interest. Congress said to them in effect, no matter, we do

not tax *you* on money you borrow, for that is not a part of *your* income; but we tax your creditor to whom you pay it, for it is a part of *his* income. You must, in the first instance, pay us, but you may, when you do pay him, deduct the amount you pay us. And, to secure you against the possibility of having the tax taken out of you, we will wait until you have the money in hand ready for him, so that you can take it from the amount going to him, and hand it over to us.

III.

I respectfully submit that the clause of the act which authorizes the company to deduct the tax from the amount due the bondholder, and to that extent stand discharged from its obligation to him, is utterly inconsistent with the idea that the tax was an excise on the business of the corporation. The bondholder has no logical or legal connection with or relation to the business of the corporation. He has no voice in its management, and is in no way responsible for the manner in which its business is conducted. He has no interest in its profits or losses, beyond that which any creditor has in the general prosperity of his debtor. If it makes a net profit of 50 per cent. on its business after paying its current debts he is not benefited by it, unless it be in the remote effect of enchancing the market value of its debts. He lends his money at a fixed rate of interest to the company, and is entitled to be repaid according to the terms of the contract, whether his debtor does any business or not. Therefore, to say that five per cent. or any other rate shall

be deducted from the amount due him to indemify his debtor for a tax levied on the business of the the latter, is certainly to present a novel idea in finance and taxation. It is true that Congress has laid excise duties on various classes of business, but neither Congress nor any other taxing power ever authorized the persons carrying on such business to re-levy the amount on their creditors, and thus make the latter pay the excise duties of the former. It is true that Congress, in taxing the gross receipts from passenger traffic authorized the railroad companies to raise their passenger fares *pro tanto;* but that was a mere mode of taxing the travelling community. A parallel case to the construction we are contending against would be one which authorized the companies to deduct their tax on gross receipts from the amount they owed their creditors.

It is very clear, therefore, that the construction of the law in question, uniformly maintained by this court down to the time the case of Railroad *vs.* Collector was decided, viz.: that the tax was essentially one on the bondholder or stockholder, and not on the corporation, is in accordance with justice and sound policy, as well as in harmony with the language and spirit of the act itself.

IV.

A word more in regard to the case of the "*State Tax on Foreign-held Bonds*" (15 *Wall.*, 300). I have cited this case at length in my principal brief, and stated that "the judgment of the court rested on two distinct grounds. One

ground was that the law of Pennsylvania, under which the tax was levied, impaired the obligation of the contract between the corporation and the bondholder. The other ground was that the taxing power of the State could have no extra territorial operation."

I now venture to suggest, with all deference to the court, and to the learned justice who delivered the prevailing opinion, that the real core of that case is in the second ground above stated, and that the first has no necessary connection with it, except as a consequence of the invalidity of the tax on non-residents.

First.—The fundamental question was, whether the statute of Pennsylvania was a valid exercise of her taxing power. This court very properly held, that it was not, so far as it affected parties not within the jurisdiction of the State. The act was left to stand to the extent that her own citizens or residents were concerned.

Second.—If the act had been void merely because it impaired the obligation of the contract between the railroad company and the bondholders, it would have been void *in toto*, for it impaired the contract between the company and the citizens of the State precisely in the same manner and to the same extent that it did between the company and the citizens of other States, domestic or foreign. If, therefore, the statute had been in conflict with the clause of the Federal Constitution which prohibits any State from impairing the obligation of contracts, it would have been invalid as to

every one; for that clause as completely protects the contracts between the citizens of the State, as those between them and the citizens of the other States. But this court held, that as to the citizens of Pennsylvania, the objection that the law impaired the obligation of contracts, was avoided, for the reason that it was simply a mode of taxing property or persons within her jurisdiction, and, therefore, subject to her taxing power. The validity of that law, like that of all others imposing taxes, terminated there. Citizens of other States, not resident in Pennsylvania, and not having property there, were beyond the reach of her power of taxation. And it was only because the attempt to levy a tax on a foreign citizen was invalid as an exercise of the taxing power of the State, that the same act by which this was attempted operated as a violation of the obligation of the contract.

We submit that the doctrine we contend for in the present case on this point rests upon the same ground, and is throughout coincident with that laid down by this court in the case of the "Tax on Foreign-held Bonds." There is nothing in the Constitution of the United States which prohibits Pennsylvania from taxing the citizens of Ohio, or California, or England, provided no power or function of the Federal Government is invaded. And it must be conceded, as the Attorney-General *naively* remarked in his first argument on this case, that there is no provision of the Federal Constitution which prohibits Congress from taxing any or all the citizens of foreign countries. But in neither case does the absence of prohibition confer power. Neither the

Federal nor State Government has the power to tax persons or property beyond their respective borders. This deficiency of power is radical, and grows out of the nature of all governments, and the division of mankind into independent communities; and Congress has no more power to tax the subjects of England than the Legislature of Pennsylvania has to tax the citizens of California. See note on next page.

In preparing this argument, the fact that the act of Congress in question passed under the scrutiny of the able and experienced lawyers in both Houses has not been forgotten. But it was enacted soon after the close of a great and exasperating military struggle, in which, in many particulars, the limitations on the power of the Federal Government were necessarily obscured or ignored. The country was groaning under an appalling load of debt incurred by the same war; and it is not surprising that the impetus given, during the war, even to wise minds, in the direction of unlimited power, should operate when they were devising means with which to satisfy the enormous demands it had created. But this fact is only another proof added to the experience of mankind, that times of public disturbance and calamity are fruitful of mistaken and dangerous expedients.

WM. D. SHIPMAN,
Of Counsel for Defendant in Error.

NOTE.—This view, as well as the general doctrine for which we are contending, is directly asserted in *Bonaparte vs. Appeal Tax Court*, decided by this Court at its last term. In that case, the Court say, by

"WAITE, C. J.—The question we are asked to decide in this "case is whether the registered public debt of one State, exempt "from taxation by the debtor State, or actually taxed there, is "taxable by another State when owned by a resident of the latter "State. We know of no provision of the Constitution of the 'United States which prohibits such taxation. It is conceded 'that no obligation of the contract of the debtor State is impaired. 'The only agreement as to taxation was that the debt should not "be taxed by the State which created it.

"It is insisted, however, that the immunity asked for arises from "article 4, section 1, of the Constitution, which provides that full "faith and credit shall be given in each State to the public acts of "every other State. We are unable to give such an effect to this "provision. No State can legislate except with reference to its "own jurisdiction. One State cannot exempt property from taxa- "tion in another. Each State is independent of all the others in "this particular. We are referred to no statute of the debtor "State which attempts to separate the *situs* of the debt from the "person of the owner, even if that is within the scope of the legis- "lative power of the State. The debt was registered, but that did "not prevent it from following the person of its owner. The debt "still remained a chose in action, with all the incidents which per- "tain to that species of property. It was 'movable' like other "debts, and had none of the attributes of 'immovability.' The "owner may be compelled to go to the debtor State to get what is "owing to him, but that does not affect his citizenship or his domi- "cil. The debtor State is in no respect his sovereign, neither has "it any of the attributes of sovereignty as to the debt it owes, ex- "cept such as belong to it as a debtor. All the obligations which "rest on the holder of the debt as a resident of the State in which "he dwells still remain, and as a member of society he must contri- "bute his just share towards supporting the government whose "protection he claims and to whose control he has submitted him- "self."

It is obvious, that if a sovereign State has no power to *exempt* the property of a non-resident alien, the *situs* of which is at his foreign domicil, from taxation, it has no power to tax his property under the same circumstances. The power to *exempt* from and the power to *impose* the tax, necessarily run parallel, and both terminate at the boundary of the state or nation.